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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ELIZABETH ANDERSON HISHON,
Petitioner,

vs.

KING & SPALDING,
Respondent.

On Certiorari To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether King & Spalding and other large institutional law firms that are organized as partnerships are, for that reason alone, exempt from Title VII of the Civil Rights Act of 1964, and are free (a) to discriminate in the promotion of associate lawyers to partnership on the basis of sex, race or religion; and (b) to discharge those associates whom they do not admit to partnership based on reasons of sex, race or religion under an established "up-or-out" policy.

INTERESTED PARTIES

The following listed parties have an interest in the outcome of this case:

Elizabeth Anderson Hishon (Petitioner)

King & Spalding (Respondent)

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PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Court of Appeals is officially reported as *Hishon* v. *King & Spalding*, 678 F.2d 1022 (11th Cir. 1982), and is reproduced as Appendix A at pages A-1 through A-16. The November 25, 1980 opinion of the district court dismissing the complaint for want of jurisdiction is unofficially reported in 25 Empl. Prac. Dec. (CCH) ¶ 31,703 (N.D. Ga. 1980), and is reproduced as Appendix B at pages A-17 through A-26.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on June 17, 1982. (Appendix C, pages A-27 through A-28) A timely petition for rehearing *en banc* was denied on September 9, 1982. (Appendix D, pages A-29 through A-30) This petition for certiorari was filed within 90 days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, provides in pertinent part:

Definitions

> (a) The term 'person' includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, *partnerships*, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.
>
> (b) The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, . . .

Section 701(a), (b), 42 U.S.C. § 2000e(a), (b).

Unlawful Employment Practices

> (a) It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 703(a)(1), (2), 42 U.S.C. § 2000e-2(a)(1), (2).

STATEMENT OF THE CASE

Petitioner, Elizabeth Anderson Hishon, is a female lawyer who was employed by King & Spalding as an associate from 1972 until her discharge in December 1979. Her Title VII action[1] alleging that King & Spalding discriminated against her on the basis of sex in denying her promotion to partnership and by terminating her employment as an associate under an "up-or-out" policy was dismissed by the district court under Fed. R. Civ. P. 12(b)(1) on the ground that Title VII does not apply to sex discrimination by partnerships.

King & Spalding is a partnership engaged in the practice of law in interstate commerce with offices in Atlanta and Washington. Complaint ¶ 2(a). King & Spalding has more than fifty partners, and employs more than fifty other lawyers as associates and more than fifty non-lawyers in secretarial, paralegal and clerical positions. Complaint ¶ 2(b).

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[1] The district court had jurisdiction of the case under 42 U.S.C. § 2000e-5(f)(3) and 28 U.S.C. § 1331.

King & Spalding was formed in 1885. At the time the complaint was filed, King & Spalding had never admitted a woman to partnership throughout its almost 100-year history. Complaint ¶ 2(c). From 1944 until 1977, however, King & Spalding employed a woman (Ms. Antha Mulkey) as the firm's only "permanent associate."[2]

Mrs. Hishon was only the second female lawyer employed by King & Spalding. She was employed in 1972 following graduation with honors from the Columbia University School of Law. Complaint ¶ 5. The complaint alleged that petitioner was induced to accept employment by King & Spalding by the express promise and representation that she would be considered for partnership on a fair, non-discriminatory basis upon satisfactory completion of five or six years' employment as an associate. Complaint ¶ 8(c), (d). The complaint also alleged that King & Spalding made similar representations to other promising law school graduates (Complaint ¶ 8) and that such promises and representations were "terms, conditions and privileges" of petitioner's employment by King & Spalding within the meaning of § 703(a)(1) of Title VII. Complaint ¶¶ 4, 16(a).

The complaint alleged that, despite King & Spalding's promises and representations of fair and non-discriminatory treatment, King & Spalding discriminated against petitioner on the basis of sex and, in considering her promotion to partnership, refused to utilize the same standards it applied to male associates who were admitted to partnership. Complaint ¶ 17(h).

The complaint also alleged that petitioner's employment as an associate was terminated as a result of the sex discrimination practiced by King & Spalding. The same discriminatory decision to refuse to admit petitioner to partnership led automatically to her dismissal as an associate under the firm's "up-or-out" policy. Complaint ¶¶ 13, 17(c).

---

[2] See listings of King & Spalding in Martindale-Hubbell Law Directory for the years 1944-1977.

The Proceedings Below[3]

The district court imposed a stay on merits discovery and granted petitioner limited period within which to conduct discovery restricted to the "coverage" issue. 678 F.2d at 1025 (App. A-5). King & Spalding produced a written partnership agreement which performed the same function as a corporate charter. *Id.* The King & Spalding partnership agreement superseded the Georgia law of partnerships and gave King & Spalding the principal attributes of incorporation, including (1) perpetual existence, (2) a trade name "King & Spalding" which does not represent the name of any of its living partners, (3) centralized management and control by a committee that is the equivalent of a corporate board of directors, and (4) a limitation on each partner's ownership interest in the assets of the firm to the amount of his "capital account."[4]

King & Spalding objected to the majority of petitioner's discovery and, when the petitioner moved to compel under Fed. R. Civ. P. 37, the district court denied the motion, and dismissed the complaint under Rule 12(b)(1) on the ground that accepting

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[3] The Equal Employment Opportunity Commission moved to participate in the action as *amicus curiae*, and for access to the record which the district court had placed under seal. The district court granted the EEOC's motion to participate, but denied it access to the record. On appeal, the EEOC again moved for access to the record and to participate as *amicus curiae*. Although the court of appeals granted the Commission's request to participate in oral argument, it failed to rule on its motion for access to the record.

[4] The majority was "well aware that large partnerships possess many attributes common to corporate forms of business. As appellant correctly points out, the United States Supreme Court has held that partnerships have 'an established institutional identity independent of the individual partners.' *Bellis* v. *United States*, 417 U.S. 85, 95." 678 F.2d at 1026 (App. A-7).

petitioner's allegations of sex discrimination by King & Spalding as true, such discrimination was outside the coverage of Title VII because King & Spalding was organized as a partnership. The district court analogized a law partnership to a marriage and the application of Title VII to a shotgun wedding:

> In a very real sense a professional partnership is like a marriage. It is, in fact, nothing less than a 'business marriage' for better or worse. Just as in marriage different brides bring different qualities into the union—some beauty, some money, and some character—so also in professional partnerships, new mates or partners are sought and bethrothed for different reasons and to serve different needs of the partnership. Some new partners bring legal skills, others bring clients. Still others bring personality and negotiating skills. In both, new mates are expected to bring not only ability and industry, but also moral character, fidelity, trustworthiness, loyalty, personality and love. Unfortunately, however, in partnerships, as in matrimony, these needed, worthy and desirable qualities are not necessarily divided evenly among the applicants according to race, age, sex or religion, and in some they just are not present at all. To use or apply Title VII to coerce a mismatched or unwanted partnership too closely resembles a statute for the enforcement of shotgun weddings.
>
> 25 Empl. Prac. Dec. (CCH) ¶ 31,703, at 20,062 (App. A-20).

The trial court ruled that petitioner was not entitled to go behind the common-law definition in an attempt to demonstrate that in the case of King & Spalding (as is true of many other law firms), the firm was organized and run in a manner that departed significantly from the common-law model of a "partnership," and had many attributes that more closely resembled a corporation. Judge Edenfield said:

> Undeniably, a private professional partnership is a voluntary association. . . . Plaintiff's emphasis on the composition and internal arrangements of this particular partnership cannot alter this inescapable conclusion. King & Spalding is a partnership, created and perpetuated as such and subject to the partnership laws of Georgia and the United States. The legal characterization of what an entity is, of course, is purely a question of state law, . . .
>
> These observations effectively dispose of plaintiff's prayers for further discovery.
>
> 25 Empl. Prac. Dec. (CCH) ¶ 31,703, at 20,062 (App. A-19).

In dismissing the complaint under Rule 12(b)(1) for want of subject-matter jurisdiction, the district court was heavily influenced by what it conceived to be the infringement of rights of "freedom of association" of King & Spalding's existing partners that would result if the firm were subjected to the coverage of Title VII and prohibited from using race, sex and religion as criteria in the selection of partners. The district court felt that it was confronted with a "dilemma" between construing Title VII to cover partnership decisions of large law firms on the one hand - a question which the court concluded was "doubtful and obscure" - and the possibility that "the right of defendant to freedom of association" would be violated if Title VII were applied to its process of selecting partners from among its associates. *Id.* at 20,064 (App. A-24). The court resolved the dilemma by deciding the "doubtful and obscure" question of coverage of Title VII over law firm partnerships against the petitioner, but with the observation that "the court is humbly aware that in reaching this conclusion it may have erred." *Id.*

The district court described its dilemma in the concluding paragraph of the opinion:

> In the end, then, the court faces this dilemma: (1) If the court finds that the case is covered by Title VII the defendant's constitutional right to freedom of association is then thrown into head-on conflict with plaintiff's constitutional right not to suffer discrimination in the terms, conditions and privileges of her employment; (2) if the court construes the Act as not covering plaintiff's claim, then there is no constitutional problem and the court should dismiss the case for want of subject-matter jurisdiction. To the court, while the right of defendant to freedom of association seems clear, the coverage of the Act seems doubtful and obscure. The court is humbly aware that in reaching this conclusion it may have erred. In considering this possibility, the court considered a balancing process which would give effect to both constitutional rights by allowing the case to proceed but would require the plaintiff, in such rare instances, to show by clear and convincing proof that, irrespective of all other justifications claimed by defendant, naked discrimination was the sole and producing cause of plaintiff's rejection as a partner. The court, however, could find no hint of any authority for a trial court to so alter the burden of proof. All of these questions will have to be resolved by a higher authority, legislative or judicial. In the meantime, the court concludes that it has no subject-matter jurisdiction of plaintiff's claim and the case is, therefore, DISMISSED.
>
> *Id.* (App. A-24, A-25).

On appeal, a divided panel of the Eleventh Circuit Court of Appeals affirmed, with Circuit Judge Peter T. Fay and Senior District Judge George C. Young in the majority, and Circuit Judge Gerald B. Tjoflat dissenting. *Hishon* v. *King & Spalding*, 678 F.2d 1022 (11th Cir. 1982). The majority ruled:

> A dismissal under Fed.R.Civ.P. 12(b)(1) is proper only when 'it appears beyond doubt that the plaintiff can prove

> no set of facts in support of [her] claim, which would entitle [her] to relief.' *McLain* v. *Real Estate Board of New Orleans, Inc.* . . . Appellant suggests that Title VII must be given the 'broadest possible interpretation' in order to effectuate its purpose - to remedy acts of discrimination within the employment context. *Rogers* v. *EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957, 92 S.Ct. 2058, 32 L.Ed.2d 343 (1972). . . . Even under the most liberal reading we cannot find the requisite congressional intent to permit Title VII's intervention into matters of voluntary association. We can conceive no set of facts which would entitle her to relief under Title VII with respect to partnership decisions. This renders the dismissal of her claim proper.
>
> 678 F.2d at 1026 (App. A-6).

Although the majority opinion refrained from expressly endorsing the freedom of association rationale of the trial court, it was heavily influenced by the notion that a partnership is a "voluntary association," and that partners of a "voluntary association" should be free to select those with whom they will "associate" in the practice of law in the absence of clear evidence of "the requisite congressional intent to permit Title VII's intervention into matters of [discrimination by] voluntary association[s]." *Id.*

Judge Tjoflat dissented on the ground that Title VII applies to petitioner's firing as an associate as a direct consequence of King & Spalding's decision to refuse her admission to partnership. Since this decision was alleged to have been based on sex, her firing, therefore, constituted employment discrimination in violation of §§ 703(a)(1) and 703(a)(2) of Title VII. 678 F.2d at 1030 (App. A-15, A-16).

Petitioner's motion for rehearing *en banc* was denied on September 9, 1982 (App. A-29, A-30).[5]

[5] Nine of the twelve active judges of the Eleventh Circuit may have disqualified themselves. Two judges served with Griffin B. Bell (now a member of King & Spalding) when Judge Bell was a member of the former Fifth Circuit. Seven other judges of the Eleventh Circuit were appointed by President Carter during the period that Judge Bell was Attorney General, and another King & Spalding partner, Charles Kirbo, was an unsalaried presidential adviser. *First Friend,* Newsweek, Jan. 24, 1977, at 24. Only three members of the court, Judges Tjoflat, Fay and Hill, were appointed after Judge Bell's resignation, and before his appointment as Attorney General.

ARGUMENT

In 1979, 15 years after the passage of Title VII, 90 of the 200 largest law firms in the United States (including King & Spalding) had no women partners; 67 other firms had only one woman partner. Epstein, *The Partnership Push*, SAVVY 29, 35 (March 1980). Whether Title VII covers the partnership decisions of large institutional law firms presents an important issue of federal law that has never been, but should be, reviewed by this Court.

First, the decision grants blanket exemption from Title VII to businesses, including most large law firms and accounting firms, that are nominally organized as partnerships. The decision affects a large segment of the economy and therefore represents a significant retreat in the enforcement of Title VII. *Second*, the decision below is particularly harmful because it encourages discrimination by large institutional law firms which historically have been bastions of discrimination. *Third*, prior decisions of the lower federal courts have held that Title VII prohibits discrimination by law firms in the hiring of associates. *Kohn* v. *Royall, Koegel & Wells*, 496 F.2d 1094 (2d Cir. 1974); *Blank* v. *Sullivan & Cromwell*, 418 F. Supp. 1 (S.D.N.Y. 1975). In *Lucido* v. *Cravath, Swaine & Moore*, 425 F. Supp. 123 (S.D.N.Y. 1977), the court held that a law firm's partnership decisions were also covered by Title VII. Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 945 (1982); Note, *Applicability of Federal Antidiscrimination Legislation to the Selection of A Law Partner*, 76 Mich. L. Rev. 282 (1977). The ruling of the lower court in this case, however, leaves women, blacks and other minorities unprotected from discrimination in seeking advancement from the entry level associate positions to the more lucrative job opportunities which are available only to partners in large law firms. *Fourth*, the ruling has the effect of placing lawyers above the laws prohibiting employment discrimination, a position that is not available to those who engage in most other businesses.

A. The Issue Is Novel And Has Never Been Previously Decided By This Court.

Whether Title VII covers the partnership decisions of law firms has never been previously considered by this Court. Although it has long been recognized that Title VII covers employment discrimination by law firms in the hiring of associates, whether Title VII applies to partnership decisions has been directly ruled upon only by the divided opinion of the court of appeals in this case and by the district court in *Lucido* v. *Cravath, Swaine & Moore,* 425 F. Supp. 123 (S.D.N.Y. 1977). Because most law firms, large accounting[4] and stock brokerage firms are organized, at least nominally, as "partnerships," as is King & Spalding, the ruling below has the effect of restricting employment opportunities of women, blacks and religious minorities in significant segments of the economy.

The complaint alleged that Title VII applied to the employment discrimination practiced by King & Spalding against Mrs. Hishon under three distinct legal theories.

1. **The entity theory** - The complaint alleged that a large partnership is a separate legal entity from its partners and, therefore, should be considered as an "employer" of the partners. *See Bellis* v. *United States,* 417 U.S. 85, 95 (1974) (holding a dissolved 3-man law partnership to be an entity separate from its former partners); *Armstrong* v. *Phinney,* 394 F.2d 661 (5th Cir. 1968) (applying the entity theory, court held a partnership to be the "employer" of a 5% partner for tax purposes). This conclusion is reinforced where the partnership has a written partnership agreement like King & Spalding's, that modifies the common law of partnerships, and gives the organization the principal attributes of incorporation, including perpetual duration and centralized management, and limits a partner's share of assets of the partnership to his invested capital in his individual capital account.

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[4] Wayne, *The Year of the Accountant,* N.Y. Times, Jan. 3, 1982, § 3, at 1, col. 2.

The economic reality of the relationship between a partner and a large institutional law firm is that it is primarily one of employment in which the partner earns a livelihood by performing services for clients of the firm. Although a partner may also be a nominal owner of the firm, his compensation is based on earnings derived from his labor, and not as a return on invested capital. In any event, this Court has held that an owner of the enterprise may also be an "employee" for federal regulatory purposes because there is nothing "inconsistent between the coexistence of a proprietary and an employment relationship." *Goldberg* v. *Whitaker House Cooperative, Inc.*, 366 U.S. 28, 32 (1961). *See also Bonilla* v. *Oakland Scavenger Co.*, ____ F.2d ____, 51 U.S.L.W. 2301 (9th Cir. Nov. 9, 1982) ("The company's organization closely entangles stock ownerships and employment privilege, but the predominant characteristics are those of employment.").

The majority recognized the force of petitioner's argument that "the Firm" should be considered as the "employer" of its partners, but refused to accept the conclusion that a large, impersonal partnership should be treated on a parity with corporations for purposes of Title VII. The majority stated:

> We are well aware that large law partnerships possess many attributes common to corporate forms of business. As appellant correctly points out, the United States Supreme Court has held that partnerships have 'an established institutional identity independent of its individual partners.' *Bellis* v. *United States*, 417 U.S. 85, 95, 94 S.Ct. 2179, 2187, 40 L.Ed.2d 678 (1974) (individual partner's fifth amendment privilege held inapplicable to prevent production of partnership records). For many purposes, such as the fifth amendment's protection, this 'separate identity' will yield results similar to those for corporations, but not for Title VII purposes.
>
> 678 F.2d at 1026 (App. A-7).

2. **Promotion was a "term, condition or privilege of employment" or an "employment opportunity."** - The complaint specifically alleged that to induce Mrs. Hishon to accept an offer of employment, King & Spalding expressly represented to her, as it did to all of its prospective associates, that she would be fairly considered for promotion to partnership on a non-discriminatory basis after five years' employment. This opportunity was not one which King & Spalding offered to everyone engaged in the practice of law, but only to those whom it was attempting to recruit and induce to accept employment by the firm. The representations by King & Spalding that it would offer each associate the opportunity to become a partner on a non-discriminatory basis was, therefore, a "term, condition or privilege [of Mrs. Hishon's] employment" as an associate, within the meaning of § 703(a)(1), and an "employment opportunity" within the meaning of § 703(a)(2) of Title VII.

Prior to the ruling in this case, courts had uniformly held that an employee's right to be considered for promotion on a non-discriminatory basis *is* covered by federal employment legislation, even if the employee would not be covered after the promotion. *See, e.g., Lucido* v. *Cravath, Swaine & Moore,* 425 F. Supp. 123 (S.D.N.Y. 1977); *NLRB* v. *Bell Aircraft Corp.,* 206 F.2d 235 (2d Cir. 1953) ("immaterial that the protection . . . afforded was calculated to enable him to obtain a position in which he would no longer be protected"). *See also Golden State Bottling Co.* v. *NLRB,* 414 U.S. 168 (1973); *Bonilla* v. *Oakland Scavenger Co.,* ____ F.2d ____, 51 U.S.L.W. 2301 (Nov. 9, 1982) ("Since the company ties preferential wages, hours, and job assignments to ownership of its stock, a shareholder preference plan constitutes a condition of employment subject to the mandate of Title VII."); *Pettway* v. *American Cast Iron Pipe Co.,* 494 F.2d 211 (5th Cir. 1974). The majority again recognized the force of petitioner's argument, but once again in an *ipse dixit* declined to accept the conclusion which flowed inevitably from that acceptance.

> We have no quarrel with the premise that an 'opportunity' can include promotion to a position beyond that of an 'employee' covered by Title VII. But, once again, we decline to extend the meaning of 'employment opportunities' beyond its intended context by encroaching upon individuals' decisions to voluntarily associate in a business partnership.
>
> * * *
>
> Decisions as to who will be partners are not within the protection of Title VII.
>
> We do have serious concerns about any representations made to the appellant regarding her future consideration for partnership. We are well aware of the significance given a firm's partnership policy by a prospective associate in determining the proper career choice. If in fact these representations are deceptively made, then perhaps an action in breach of contract or misrepresentation may provide a more appropriate vehicle for the appellant to drive toward a legal remedy.
>
> 678 F.2d at 1028-29 (App. A-11, A-13).

The majority failed to explain how a representation of nondiscriminatory promotional consideration could support "an action in breach of contract or misrepresentation," without also supporting an action under Title VII based on the discriminatory denial of a "term, condition or privilege of employment" under § 703(a)(1), or an "employment opportunity" under § 703(a)(2).

3. **Discharge as an employee was caused by discriminatory denial of promotion to partnership.** - The complaint alleged and King & Spalding admitted that it terminated Mrs. Hishon's employment under an "up-or-out" policy. Under the policy, when King & Spalding discriminated against Mrs. Hishon by refusing to promote her to partnership based on sex, the firm

simultaneously decided to terminate her employment as an associate. Her subsequent firing was the direct result of discrimination based on sex and its effect was to "deprive [Mrs. Hishon] of employment opportunities [and] otherwise directly affect [Mrs. Hishon's] status as an employee" of King & Spalding, in violation of the literal language of § 703(a)(2) of Title VII. *Lucido* v. *Cravath, Swaine & Moore*, 425 F. Supp. at 123. *Compare, Bonilla* v. *Oakland Scavenger Co., supra.*

The majority, over the strong dissent of Judge Tjoflat, dismissed this claim as a "back-door" attempt to obtain Title VII coverage of the partnership decision. 678 F.2d at 1029-30 (App. A-14, A-15, A-16).

B. The Decision Below Has Interpreted Title VII Narrowly And In A Manner That Conflicts With The Intention Of Congress, Prior Decisions Of This Court Interpreting Title VII, And Prior Decisions Of This Court Interpreting Other Federal Statutes Regulating Employment.

The lower court's majority opinion reflects an extreme reluctance to apply Title VII to law firms in the same manner that Title VII has been applied to other occupations. *See* Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 945 (1982). The majority placed primary emphasis upon the common-law concept of partnership as a "voluntary association," but in doing so, "conceal[ed] from themselves the real-life fact that lawyers earn their livelihood at the bar" (*Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977)) from their personal labor on behalf of clients of "the Firm." The majority placed a higher value on the right of the existing partners to maintain a "voluntary association" based on race, sex or other invidious criteria and relatively little value on the rights of thousands of women, blacks or Jews who are employed as associates in law firms to pursue professional job opportunities free of discrimination.

The majority's restrictive interpretation of Title VII constitutes a significant retreat in the battle against employment discrimination, not only in blue-collar positions, but also in the professions. This retreat cannot be reconciled with the decisions of this Court.

First, the majority's narrow view of Title VII does not reflect the intent of Congress. This Court has held that "in enacting Title VII of the Civil Rights Act of 1964 Congress intended to prohibit *all practices* in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex or national origin [citations] and ordained that its policy of outlawing such discrimination should have the 'highest priority.' " *Franks* v. *Bowman Transportation Co., Inc.*, 424 U.S. 747, 763 (1976). There is no doubt that Congress intended to outlaw discrimination in the professions for, as this Court emphasized only last term, "Congress required 'the removal of artificial, arbitrary, and unnecessary barriers to employment' and *professional development* that had historically been encountered by women, blacks and other minorities." *Connecticut* v. *Teal,* ____ U.S. ____, 50 U.S.L.W. 4716 (June 21, 1982) (No. 80-2147) (emphasis supplied).

Second, the majority's interpretation of Title VII so as to preclude its coverage of partnership decisions judicially creates an exception to the application of Title VII that Congress chose not to include in the statute. This Court has held that "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Andrus* v. *Glover Construction Co.*, 446 U.S. 608, 616-17 (1980); *Continental Casualty Co.* v. *United States,* 314 U.S. 527, 533 (1942). Congress specifically enumerated various exceptions to Title VII's prohibition of employment discrimination, exempting, for example, employers having fewer than fifteen employees (42 U.S.C. § 2000e(b)), and persons elected to public office (42 U.S.C. § 2000e(f). There has been no showing in this case of a legislative intent to create an additional exception for partnerships. *See also Bonilla* v. *Oakland Scavenger Co., supra.*

Third, while the majority gave lip service to this Court's many decisions which have held that Title VII "must be given the 'broadest possible interpretation' " (678 F.2d at 1026, App. A-6), it nonetheless used the common-law concept of partnership as a "voluntary association" to interpret Title VII very narrowly and ignored the economic reality of the relationship betweenan individual partner and the very large, impersonal law firm.

Fourth, the majority's approach to the interpretation of Title VII was directly contrary to the approach mandated by the decisions of this Court. The majority placed upon the petitioner the burden of demonstrating from the legislative history that Congress discussed the subject of discrimination by law firms and other partnerships and specifically intended to cover partnership decisions. Finding an absence of positive evidence of "the *requisite* congressional intent" (678 F.2d at 1026, App. A-6 (emphasis supplied)), the majority presumed that Congress intended to leave discrimination by law parternships and other voluntary associations in the selection of partners untouched by Title VII's otherwise comprehensive prohibitions against discrimination in the workplace. The majority thus disregarded the teaching of *County of Washington* v. *Gunther,* 452 U.S. 161 (1981), in which this Court explained that, because Title VII was "intended to be broadly inclusive" [*id.* at 170], the lower federal courts "must therefore *avoid interpretations* of Title VII that deprive victims of discrimination of a remedy, *without clear congressional mandate.*" *Id.* at 178 (emphasis supplied).

Fifth, in holding that the terms "employer," "employee" and "employment" in Title VII did not encompass the relationship between a partner and a law firm, the majority implicitly rejected decisions of this Court that have interpreted those terms liberally. There can be no doubt that Congress specifically intended Title VII to reach all forms of job discrimination, including the employment practices of partnerships. "Partnership" is expressly included in the definition of the term

"employer" in § 701(a) (quoted *supra* p. 1). Moreover, when Congress enacted Title VII, it used the same broad definitions of the terms "employer" and "employee" that had been used in the National Labor Relations Act, the Social Security Act and the Fair Labor Standards Act. In three important cases which preceded the enactment of Title VII, this Court applied an "economic reality test" to require that the term "employee" as used in each of these three statutes be given the comprehensive definition, and rejected attempts to narrow the scope of these statutes by use of restrictive common-law concepts of the employer-employee relationship. *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944) (National Labor Relations Act); *United States* v. *Silk*, 331 U.S. 704 (1947) (Social Security Act); *Goldberg* v. *Whitaker House Cooperative, Inc.*, 366 U.S. 28 (1961) (Fair Labor Standards Act).

In *NLRB* v. *Hearst Publications, Inc.*, for example, this Court emphasized that:

> Congress recognized those economic relationships cannot be fitted neatly into the containers designated 'employee' and 'employer' which an earlier law had shaped for different purposes . . .
>
> * * *
>
> In this light, the broad language of the Act's definitions, which in terms reject conventional limitations on such conceptions as 'employee,' 'employer,' and 'labor dispute,' leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications.
>
> 322 U.S. at 128-29.

Moreover, in *Goldberg* v. *Whitaker House Cooperative*, which was decided only three years before the passage of Title VII, this Court held that an "owner" of a cooperative could also be con-

sidered an "employee" if the economic reality of the relationship was that she worked for the organization. The Court explained that "ownership" and "employee" status were not mutually exclusive:

> There is nothing inherently inconsistent between the coexistence of a proprietary and an employment relationship. If members of a trade union bought stock in their corporate employer, they would not cease to be employees within the conception of the Act. . . . We fail to see why a member of a cooperative may not also be an employee of the cooperative. In this case the members seem to us to be both 'members' and 'employees.' It is the cooperative that is affording them 'the opportunity to work, and paying them for it, . . .
>
> 366 U.S. at 32.

It is well established that when Congress uses the same term (*i.e.*, "employee") in a later statute that it had used in earlier statutes regulating the same general subject (in this case, employment), and the term in the earlier statutes have been the subject of Supreme Court interpretations at the time the later statute was enacted, as was true in the case of Title VII, it is presumed that Congress was aware of this Court's interpretations and intended to adopt this Court's construction of those terms. *Cannon* v. *University of Chicago*, 441 U.S. 677, 699 (1979) ("[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents from this and other federal courts and that it expected its enactment to be interpreted in conformity with them."); *Hargrove* v. *Oki Nursery, Inc.*, 646 F.2d 716, 720 (2d Cir. 1981) ("Use of the same language in various enactments dealing with the same general subject matter [*i.e.*, employment] . . . is a strong indication that the statutes should be interpreted to mean the same thing.").

The majority ignored *Cannon* and pretended to interpret the term "employment" according to its common, every-day meaning, 678 F.2d at 1027 (App. A-8, A-9). It, however, ignored the definition of "employment" in *Webster's Third New International Dictionary* 743 (1976) as "activity in which one engages and employs his time and energies," and "work . . . in which one's labor or services are paid for by an employer." Furthermore, while recognizing that this Court's prior cases established an "economic reality test" of employment (678 F.2d at 1027 n.9, App. A-9), it refused to accept the conclusion that flows inevitably from the application of such a test - that economic reality of the relationship between a partner and a large law firm is one of employment. The majority elected, instead, to deny coverage under Title VII by utilizing the narrow concept of partnership derived from the common-law that "The very essence of a partnership is the voluntary joinder of all partners with each other." 678 F.2d at 1028 (App. A-10).

Sixth, the majority's interpretation of Title VII conflicts with the position of the Equal Employment Opportunity Commission that Title VII applies to a law firm's partnership decision. *See* Amicus Brief of EEOC (filed with the court of appeals on March 23, 1981). "When faced with a problem of statutory construction, this Court [has shown] great deference to the interpretation given the statute by the officers or agency charged with its administration." *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). Because the EEOC is the administrative agency empowered by Congress to enforce, interpret, and administer Title VII, "that respect which is customarily given to a practical administrative construction of a disputed provision" (*Power Reactor Development Co.* v. *Electricians*, 367 U.S. 396, 408 (1961)), should be accorded to the EEOC's interpretation of Title VII. *County of Washington* v. *Gunther*, 452 U.S. 161, 177-78 (1981); *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-34 (1971).

Seventh, it is obvious that the majority was blinded by the same discredited notions that influenced the trial court - that partners in a large institutional law firm such as King & Spalding possess a cognizable legal right of "voluntary association" that transcends Title VII's prohibitions of employment discrimination. "Voluntary association" as used by the lower court was simply a code for the right to discriminate and *not* to work with women, blacks, Jews or other minorities as equals in the practice of law. This pernicious premise infected the reasoning of the majority and is directly refuted by this Court's ruling in *Runyon* v. *McCrary*, 427 U.S. 160, 176 (1976), which emphasized that " 'the Constitution . . . places no value on discrimination' . . . and while '[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . it has never been accorded affirmative constitutional protection."

C. **Discrimination By Law Firms Has Been A Historic Problem.**

Although the legal profession has as its motto "Equal Justice Under Law," it is no secret that many of the large law firms throughout the United States have for many years practiced overt discrimination against the employment of women, Jews, blacks and other minorities. *See* C. Epstein, *Women in Law* 82 (1981); P. Hoffman, *Lions in the Street* 11-12 (1973).

King & Spalding is not atypical of many other large law firms. In his recent book, Morris Abram described "the awful and inescapable reality that no Jew had ever been employed by that firm, now the renowned King & Spalding of Griffin Bell and Charles Kirbo." M. Abram, *The Day is Short* 62, 95 (1982).

Judge Phyllis Kravitch of the Eleventh Circuit had a similar experience. Although King & Spalding was not mentioned by name, her experience upon graduation from the University of Pennsylvania Law School has been described as follows:

> After graduating from the University of Pennsylvania Law School in 1943, one of two women in the class, she was lucky to find a place to practice law - her father's firm in Savannah. At the time, most law firms didn't hire women - not even good students like Judge Kravitch, who had been on the editorial board of the school's law review. Prestigious judicial clerkships were also closed to women then. 'When I started practicing law,' says Judge Kravitch, 'the doors were not only closed, they were locked.'
>
> Goolrick, *Equality Under the Law?,* Atlanta J. & Const., June 8, 1980 (Atlanta Weekly Magazine), at 16, col. 3.

Petitioner was only the second woman associate employed by King & Spalding in its almost 100-year history. Martindale-Hubbell reflects that the first woman employed by King & Spalding (Ms. Antha Mulkey) was employed in 1944. Although Ms. Mulkey was sufficiently well qualified to practice law at King & Spalding, she remained in the employ of the firm *for 33 years as its only permanent associate,* while more than fifty less experienced male associates employed after Ms. Mulkey were regularly promoted over her into partnership.

The attitude of King & Spalding, as well as other law firms, toward the employment of women lawyers is a reflection of a widely-shared attitude toward women in the legal profession that was expressed by Mr. Justice Bradley in the *Myra Bradwell* case, in which this Court upheld the right of Illinois to exclude women from the practice of law:

> [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is

> founded in the divine ordinance as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong or should belong to the family institution, is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . . This very incapacity was one circumstance which the supreme court of Illinois deemed important in rendering a married woman incompetent fully to perform the duties and trusts that belong to the office of an attorney and counselor.
>
> It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.
>
> *Bradwell* v. *Illinois*, 83 U.S. 130, 141 (1873).

D. **The Decision Below Affects A Significant Segment Of The Economy.**

The exemption of partnerships from Title VII at least perpetuates, if it does not encourage, continued employment discrimination in the upper echelons of the legal and accounting professions, which impact significant segments of the economy.

This Court has recognized that "*some of the most powerful private institutions in the Nation are conducted in partnership form. Wall Street law firms* and stock brokerage firms provide significant examples. These are often large impersonal, highly structured enterprises of essentially perpetual duration." *Bellis* v. *United States*, 417 U.S. 85, 93-94 (1974) (emphasis supplied).

The Big Eight national accounting firms are also organized as partnerships. The largest in terms of number of partners (Coopers & Lybrand) has 2,010 partners worldwide and 1981 revenues of $998 million. The smallest of the Big Eight (Arthur Andersen & Co.) has 1,400 partners and 1981 revenues estimated over $973 million. *See Wayne, The Year of the Accountant,* N.Y. Times, Jan. 3, 1982, § 3, at 1, col. 2.

Although smaller than the Big Eight accounting firms, the major law firms in the United States represent centers of economic and political power far out of proportion to their numbers of their contributors to the GNP. *See* J. Goulden, *The Superlawyers* (1972); P. Hoffman, *Lions in the Street* (1973). King & Spalding's high profile during the Carter Administration[7] is typical of the influence wielded by many other large institutional law firms in New York, Washington, and in state capitals throughout the Nation.

The effects of the lower court's endorsement of continued discrimination by King & Spalding and other large partnerships cannot be dismissed as inconsequential. There are more than 29,000 law partnerships in the United States. U.S. Bureau of the Census, Statistical Abstract of the United States 184, Chart No. 317 (102d ed. 1981). In 1977, the legal profession was an 18.7 billion dollar industry of which $10,093,000,000 was received by partnerships. *Id.*

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[7] Numerous articles and other press stories were written about King & Spalding and its connection with members of the Carter Administration. *See, e.g.,* Reuters Ltd., Dateline: Atlanta, June 19, 1979 (" . . . King & Spalding, one of the best connected law firms in the country . . ."; "King & Spalding, with 107 lawyers, is not the city's largest firm, but its corporate and social ties are perhaps the most venerable."); *The First Friend,* Newsweek, Jan. 24, 1977, at 24 (" . . . King & Spalding, a Southern gentlemanly law firm in Atlanta . . . ").

In 1982, the law firms included in the National Law Journal's list of the Top 200 law firms employed a total of 16,683 associates. These firms ranged in size from Chicago's Baker & McKenzie, which has 236 partners and 377 associates, and operates 28 offices in the United States and in foreign countries, to Boston's Herrick & Smith, which has 80 lawyers. *The Top 200 Law Firms,* National Law Journal, September 13, 1982, at 14, 16, 18-19, September 20, 1982, at 13-16. In 1979, King & Spalding ranked 97th, in 1980 106th, in 1981 98th, and in 1982 115th among the Top 200 law firms in total numbers of lawyers. *Id.;* National Law Journal, October 6, 1980, at 32-37, October 13, 1980, at 34-38.

Furthermore, law firms are big business relative to the size of most other businesses that are covered by Title VII. In absolute terms, King & Spalding had more lawyers in 1980 (102) than the number of employees of 98% of all business "establishments" in the United States, as defined by the Bureau of the Census. Disregarding the secretarial, paralegal and clerical workers employed by King & Spalding that number in excess of 50, King & Spalding has more lawyers than 92% of the "establishments" in the United States that have 15 or more employees and, therefore, meet the "size of business" test of Title VII. 42 U.S.C. § 2000e(b). Even if only the number of associates employed by King & Spalding (50) is considered, King & Spalding was larger than 77% of the "establishments" in the United States that are covered by Title VII.[9]

E. Coverage Of Title VII In This Case Will Help To Eradicate The Discrimination That Still Exists In The Upper Echelons Of The Legal Profession.

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[9] U. S. Dept. of Commerce, Bureau of Census, *County Business Patterns - United States,* Table 1B - United States - Establishments, Employees and Payroll by Industry by Employment - Size Class: 1977.

The enactment of Title VII marked a turning point in the employment of women in the legal profession. In 1964, there were fewer than 2,200 women (4%) enrolled in accredited law schools. Ten years later, the number of women law students had increased ten-fold to 21,788 (21%). By 1981, the number had reached 44,986 or 35% of the total law school enrollment. Asso. of Am. L. Sch., *Prelaw Handbook 1982-83* 11 (1982).

The objective evidence indicates that women as a group are as well qualified as men, intellectually and academically, to practice law. A 1972 survey of eight leading law schools found that 53% of the women, and only 35% of the men, enrolled in law school graduated in the top 10% of their undergraduate classes. Stevens, *Law Schools and Law Students,* 59 Va. L. Rev. 572 (1973). In fact, a study of LSAT scores reflects that during each year from 1969-73, median LSAT scores of women were consistently *higher* than those of their male counterparts. L. Wightman, *Male-Female LSAT Candiate Study 1969-73,* Educational Testing Service (1974). *See also* C. Epstein, *Women in Law* 56-57 (1981); Barber, *Employment Discrimination Against Women Lawyers,* 59 A.B.A.J. 1029 (Sept. 1973).

Despite the objective evidence that women are as well qualified as men to practice law, the employment of women in the legal profession has trailed far behind their enrollment in law schools. In 1972, eight years after the enactment of Title VII, and the year Mrs. Hishon was employed by King & Spalding, women comprised only 3.8% of the total number employed as lawyers or judges in the legal profession. U. S. Bureau of Census, Statistical Abstract of the United States 402, Chart No. 675 (102d ed. 1981). In 1974 and 1975, the Second Circuit and several district courts upheld sex discrimination claims filed by women lawyers against law firms that, like King & Spalding, were organized as partnerships. ***Kohn*** v. ***Royall, Koegel & Wells, supra; Blank*** v. ***Sullivan & Cromwell, supra.*** Largely as a result of these decisions, the number of women employed in the legal profession increased more than three-fold

in the next eight years, to 12.8% in 1980. U.S. Bureau of Census, Statistical Abstract of the United States 402, Chart No. 675 (102d ed. 1981). A large percentage of these women are employed as associates in law firms. C. Epstein, *Women in Law* 53 (1981).

The combined effect of increased numbers of women admitted to law schools and decisions holding Title VII to prohibit discrimination by law firms against the employment of women as associates has been to expand job opportunities available to women in lower echelons of the legal profession. The upper echelon partnership positions remain closed to women at many law firms or are available only on discriminatory terms to the exceptional "Superwoman." *See* C. Epstein, *Women in Law* 175-218 (1981).

CONCLUSION

Many women, blacks and other minorities owe their admission to law schools and subsequent employment by law firms to Title VII. The decision below expressly allows large law firms to discriminate against those associates who are women, blacks or religious minorities when it comes to the process of selecting from among the associates employed by the firms those who will be made partner. For women, blacks and other minorities enrolled in law schools or employed as associates in law firms, the decision by the lower court is their *Dred Scott* case. It is incompatible with this Court's prior decisions interpreting Title VII and signals a major setback in the fight to eliminate discrimination in the professions.

A writ of certiorari should, therefore, be granted to review, and ultimately reverse, the decision below.

Respectfully submitted,

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APPENDIX A

Elizabeth Anderson HISHON,
Plaintiff-Appellant,

v.

KING & SPALDING, a Partnership,
Defendant-Appellee.

No. 80-9021.

United States Court of Appeals,
Eleventh Circuit.

June 17, 1982.

Appeal from the United States District Court for the Northern District of Georgia.

Before TJOFLAT and FAY, Circuit Judges, and YOUNG*, District Judge.

FAY, Circuit Judge:

A voluntary association of two or more persons established for the purpose of engaging in a common enterprise has traditionally been known as a partnership. It is from within this framework this Court now confronts a novel question of jurisdiction under Title VII. Elizabeth Anderson Hishon filed a Title VII action against King & Spalding, a law firm, alleging that it discriminated against her on the basis of sex in its refusal to invite her into its partnership. After considering lengthy and detailed memoranda, Judge Newell Edenfield of the Northern District of Georgia, held Title VII inapplicable to partnership decisions, leaving the District Court without subject matter

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* Honorable George C. Young, U. S. District Judge for the Middle District of Florida, sitting by designation.

jurisdiction of the claim. Judge Edenfield dismissed the case under Fed.R.Civ.P. 12(b)(1).[1] The plaintiff appeals the District Court's ruling and provides us with a myriad of creative reasons why the particular partnership in issue here should be subject to the protection afforded "employees" by Title VII. While the arguments are appealing and discrimination in any form must not be tolerated, we cannot overlook the essence of a partnership—voluntary association. We are therefore compelled to reject the corporate characterizations of King & Spalding set forth by the plaintiff, and hold that Title VII does not apply to decisions regarding partnership. We affirm the District Court's dismissal.

In 1972, Elizabeth Hishon accepted a position as an associate with King & Spalding. King & Spalding is a large Atlanta law firm which operates as a general partnership. The partnership consists of approximately fifty active lawyers and employs approximately fifty additional lawyers as associates. At the time the plaintiff became an associate with the firm, consideration for partnership occurred at the end of an associate's sixth year. The firm also maintained an "up or out" policy. Under this policy, if the partnership did not invite an associate to become a partner after the requisite time, the associate was allowed to remain with the firm only for such reasonable period as necessary to secure other employment.

In May, 1978, the partnership considered Ms. Hishon, along with other associates hired at the same time, and decided not to invite her to join the partnership.[2] She was promptly notified,

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[1] In rendering his decision, the trial judge additionally dealt with the plaintiff's motion to compel discovery. In view of his decision to dismiss the case, the request for further discovery was denied.

[2] It is significant to note that the partnership made the same decision with respect to two male associates, while other male associates within the group were invited to join the partnership.

and was extended the normal period of time to secure other employment. Eight months later, Ms. Hishon requested reconsideration for partnership. At the conclusion of the May, 1979, partnership meeting, the result was the same—Ms. Hishon was not invited into the partnership.[3] Again the partnership notified her of the outcome. Ms. Hishon left the firm on December 31, 1979.

Prior to her departure from the firm, Ms. Hishon filed a sex discrimination claim with the Equal Employment Opportunity Commission. Within ten days the Commission issued a Notice of Right to Sue, and Ms. Hishon filed her complaint in District Court within the statutory 90-day period.

The complaint contained three counts. The first count, the only one considered by the District Court, alleged sex discrimination in the firm's decision not to make her a partner.[4]

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[3] The parties vigorously dispute the nature of the May, 1979, decision. King & Spalding claims the partnership voted not to reconsider Ms. Hishon for partnership and that the decision not to invite her was made in 1978. Ms. Hishon claims, however, that King & Spalding reconsidered and revoted on the partnership issue at its May, 1979, meeting. In its motion to dismiss, King & Spalding argued that since the partnership decision had been made in May, 1978, Ms. Hishon had exceeded the 180-day filing deadline for employment discrimination suits. 42 U.S.C. § 2000e-5(e) (1976); *Bickham* v. *Miller*, 584 F.2d 736 (5th Cir. 1978). Because we find Title VII inapplicable, the argument no longer retains its vitality and the disputed issue is of little consequence.

[4] The complaint contained numerous instances of alleged sex discrimination within the plaintiff's seven and one half years of association with the firm. During oral argument the panel questioned whether the plaintiff inteded to pursue individual claims of discrimination under Title VII regardless of the outcome of this ap-

(Footnote 4 continued)

peal. Subsequent correspondence from plaintiff's counsel relieves this Court of its initial concern.

In a letter dated January 18, 1982, counsel for King & Spalding informed this Court that all parties had expressly agreed with the District Court to limit its ruling to the threshold jurisdictional issue now presented on appeal. The suggestion, in fact, had been made originally by Ms. Hishon's counsel in an earlier letter:

> If King & Spalding were to prevail on this threshold question, discovery on the merits aimed at establishing that it has in fact discriminated against women and other minorities in its employment, promotion and compensation decisions, as well as discovery into matters of partner compensation for the purpose of establishing damages under Title VII, would be moot.

Letter from Emmet J. Bondurant to Judge Newell Edenfield (March 31, 1980); Record at 82-84.

A subsequent letter from Ms. Hishon's counsel, dated January 25, 1982, confirms the limited area of inquiry and the plaintiff's intention to focus on the partnership question alone.

> Appellant did not intend to assert separate claims based on each individual episode of sex discrimination practiced against her as an employee that is alleged in the complaint. If the case is reversed and remanded for trial under one or more of the three legal theories referred to above, plaintiff does intend, however, to prove the acts of discrimination practiced against her as an associate as evidence of the existence of a continuing pattern and practice of discrimination on the part of King & Spalding, as evidence that she had diminished opportunities to demonstrate that she was partnership material as compared to her male counterparts who were more favorably treated, and as evidence that King & Spalding's ultimate decision to deny her admission to partnership was based on sex and not a legitimate evaluation of her professional capabilities.
>
> If the Court should conclude (contrary to appellant's arguments) that Title VII does not apply to the three "partnership" claims asserted by plaintiff under any of the three legal theories which she has advanced, *plaintiff does not desire a remand of the court below in order to afford plaintiff an opportunity to try any other Title VII claims based on individual*

Count two alleged a violation of the Equal Pay Act, and count three alleged breach of contract.[5]

Due to the particularly sensitive nature of the discovery (the contents of the firm's partnership agreement) and the unique legal issue presented in count one, the parties and the District Court mutually agreed to limit initial discovery to information needed to determine the jurisdictional issue of Title VII. King & Spalding supplied an edited version of its partnership agreement in compliance with discovery requests as well as answers and objections to numerous interrogatories. All of this information and the briefs for this appeal were placed under seal to avoid any unnecessary disclosure.[6] In ruling on King & Spalding's motion to dismiss, the District Court also ruled against the plaintiff's request for additional discovery. Amidst the three-count complaint, sensitive discovery, the unique legal issue posed, and the professional courtesy extended by all involved, this Court is confronted with but a single narrow issue: whether Title VII applies to a law firm's decisions regarding its partners?

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episodes of sex discrimination that may have been practiced against her while she was an associate of King & Spalding.

Letter from Emmet J. Bondurant to Judges Tjoflat, Fay and Young (January 25, 1982) (emphasis supplied). In light of this correspondence, we find no jurisdictional barrier to our rendering a decision on the Title VII count limited solely to partnership decisions.

[5] We do not find any additional obstacle posed by the original existence of two other counts. According to the plaintiff's brief; "Counts Two and Three of the complaint, which alleged violations of the Equal Pay Act, 29 U.S.C. § 206(d)(1), and a contract claim, have been informally withdrawn and dismissed by plaintiff without prejudice." Brief for Appellant at 2 n.1. *See also* Letter from Hamilton Lokey to Judges Tjoflat, Fay and Young (January 18, 1982) and Letter from Emmet J. Bondurant to Judges Tjoflat, Fay and Young (January 25, 1982).

[6] The Equal Employment Opportunity Commission participated as amicus curiae in the District Court and submitted an amicus brief supporting the appellant's position in this appeal. At one point the Commission had requested access to all discovery. The District Court denied its request.

A dismissal under Fed.R.Civ.P. 12(b)(1) is proper only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim, which would entitle [her] to relief." *McLain* v. *Real Estate Board of New Orleans, Inc.*, [444 U.S. 232, 246, 100 S.Ct. 502, 511, 62 L.Ed.2d 441 (1980) (quoting *Conley* v. *Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957).] Appellant suggests that Title VII must be given the "broadest possible interpretation" in order to effectuate its purpose—to remedy acts of discrimination within the employment context. *Rogers* v. *EEOC,* 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied,* 406 U.S. 957, 92 S.Ct. 2058, 32 L.Ed.2d 343 (1972). Under such a broad reading and in conjunction with her altered characterizations of King & Spalding, she hopes to persuade us of Title VII's application to partnership decisions. Even under the most liberal reading we cannot find the requisite congressional intent to permit Title VII's intervention into matters of voluntary association. We can conceive no set of facts which would entitle her to relief under Title VII with respect to partnership decisions. This renders the dismissal of her claim proper.

Appellant prposes three bases upon which to find jurisdiction under Title VII: (1) partners at King & Spalding are equivalent to "employees" of a corporation thereby establishing the employment context for Title VII's application; (2) elevation to partnership is an "employment opportunity" or a "term, condition or privilege of employment" protected by Title VII; and (3) termination of employment as a result of failure to make partner falls within the ambit of an unlawful discharge prohibited by Title VII. Despite the alluring quality of her arguments, we are unpersuaded. An examination of her attempts to recharacterize the law firm partnership as a corporation reveals their transparent nature.

Partnership or Corporation?

The appellant argues the size and complexion of King & Spalding's partnership is more akin to a corporation possessing a separate and distinct identity and that its partners are more like employees than owners.* We are well aware that large law partnerships possess many attributes common to corporate forms of business. As appellant correctly points out, the United States Supreme Court has held that partnerships have "an established institutional identity independent of its individual partners." *Bellis* v. *United States*, 417 U.S. 85, 95, 94 S.Ct. 2179, 2187, 40 L.Ed.2d 678 (1974) (individual partner's fifth amendment privilege held inapplicable to prevent production of partnership records). For many purposes, such as the fifth amendment's protection, this "separate identity" will yield results similar to those for corporations, but not for Title VII purposes.

Next the appellant contends that because King & Spalding has a written partnership agreement, the firm has expressly altered its existence from a traditional common law partnership to the skeletal structure of a corporation. This argument is another attempt to equate partners of a large firm with employees of a corporation. We have reviewed the appellant's list of alleged alterations and find they do nothing more than clarify the internal structure of the firm. Under Georgia law "[a] partnership may be created either by written or parol contract." Ga.Code Ann. § 75-101 (1981). King & Spalding has reduced its partnership structure to writing; there is no merit to the contention that in doing so, it has unbeknownst to itself incorporated its partnership.

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* Under appellant's theory, if it can be shown that partners are employees of the partnership rather than owners, an employment relationship exists rendering Title VII applicable to partnership decisions since the decision would then be relegated to nothing more than a simple promotion.

Additionally, the appellant points out that the United States Supreme Court and the former Fifth Circuit[1] have held that part ownership of a business does not preclude a person's classification as an employee subject to federal employment legislation. *Goldberg* v. *Whitaker House Cooperative, Inc.*, 366 U.S. 28, 81 S.Ct. 933, 6 L.Ed.2d 100 (1961); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir.), *rehearing en banc denied*, 494 F.2d 1296 (5th Cir. 1974). It would be unrealistic to assume a person cannot maintain a proprietary interest and simultaneously work in the business. Mutual exclusivity neither exists nor is required in a law firm in order for the firm to maintain its desired partnership structure. This lack of exclusivity, however, does not render the term "partner" equivalent to the term "employee" for purposes of Title VII.

Partner or Employee?

The status of "an employee under Title VII is a question of federal . . . law; it is to be ascertained through consideration of the statutory language of the Act, its legislative history, existing federal case law, and the particular circumstances of the case at hand." *Calderon* v. *Martin County*, 639 F.2d 271, 272-73 (5th Cir. 1981). Neither the statutory language nor the legislative history of Title VII greatly illuminate this otherwise gray area. First, Title VII merely defines an employee as "an individual employed by an employer." 42 U.S.C. § 2000e(f) (1976). Second, the legislative history reveals but a single remark. During the Senate Debate Senator Clark stated that the term "employer" was "intended to have its common dictionary

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[1] The Eleventh Circuit sitting en banc adopted the law of the Fifth Circuit as it existed on September 30, 1981 in *Bonner* v. *City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc).

meaning, except as expressly qualified by the Act."[9] 110 Cong.Rec. 7216 (Apr. 8, 1964).

Third, existing federal case law includes analysis under the "economic realities" test, traditional agency and partnership principles, and the four-part test set forth in *Calderon*.[10] *See, e.g., Lutcher* v. *Musicians Union Local 47*, 633 F.2d 880 (9th Cir. 1980) (Title VII); *Spirides* v. *Reinhardt*, 613 F.2d 826 (D.C.Cir.1979) (Title VII); *Burke* v. *Friedman*, 556 F.2d 867 (7th Cir. 1977) (Title VII); *Donovan* v. *Tehco, Inc.*, 642 F.2d 141 (5th Cir. 1981) (Fair Labor Standards Act).

The Seventh Circuit provides a most enlightening discussion of whether Title VII applies to an accounting firm operating as a partnership in *Burke* v. *Friedman*. Citing Fifth Circuit prece-

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[9] The appellant urges this Court to adopt an "economic reality" test for determining whether the partners at King & Spalding are "employees." The test is derived from the United States Suprme Court's decision in *NLRB* v. *Hearst Publications Co.*, 322 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170 (1944), in which the Court applied the term "employee" as found within the National Labor Relations Act. The Court defined the term according to "the purpose of the Act and the facts involved in the economic relationship." *Id.* at 129, 64 S.Ct. at 859. The former Fifth Circuit recently employed this test in deciding whether an individual was an "employee" for purposes of the Fair Labor Standards Act. *Donovan* v. *Tehco, Inc.*, 642 F.2d 141 (5th Cir. 1981). Other courts have considered this approach under Title VII. The appellee, however, contends the term should be given its common dictionary meaning as suggested by Senator Clark in reference to the term employer. We find the *Calderon* test provides a more comprehensive standard by evaluating all relevant criteria.

[10] We are aware that *Calderon* dealt with the classification of "employee" for purposes of establishing whether the plaintiff qualified in order to maintain an action under Title VII, whereas we are faced with whether the individual members of the defendant partnership may be considered employees. Each question is jurisdictional in origin, however, and we find *Calderon's* test especially appropriate.

dent in recognition that "Title VII's definition of "employee" is not restrictive.' " the court applied traditional partnership principles and held that partners were not employees. *Id.* at 869 (quoting *McClure* v. *Salvation Army,* 460 F.2d 553 (5th Cir.), *cert. denied,* 409 U.S. 896, 93 S.Ct. 132, 34 L.Ed.2d 153 (1972)). In *Burke,* a female employee filed a sex discrmination action for wrongful discharge. Without counting the accounting firm's partners as employees, the partnership did not qualify as an "employer" since it employed less than fifteen "employees." While the precise issue varies from the issue before us, the Seventh Circuit has announced its hesitation to equate partners with employees. We have the same reluctance.

Fourth, the particular circumstances of this case are clear. King & Spalding operates as a partnership under the laws of Georgia. It files tax returns as a partnership. It is comprised of fifty active partners and employs approximately fifty associates along with other support personnel. It has a lengthy partnership agreement with detailed provisions as to profits, losses, withdrawal, dissolution, etc. But it is clearly a voluntary association of lawyers for the purpose of practicing law as joint venturers. The partnership is the appellant's employer; the partners own the partnership; they are not its "employees" under Title VII.

We find a clear distinction between employees of a corporation and partners of a law firm. In making this distinction, we do not presume to exalt form over substance. In this instance, however, the form *is* the substance, and we are unwilling to dictate partnership decisions under the guise of employee promotions protected by Title VII. The very essence of a partnership is the voluntary joinder of all partners with each other.

"But You Promised"

Appellant's second point concerns King & Spalding's alleged representations to her that in return for satisfactory work as an associate for a designated number of years, an invitation to

partnership would be forthcoming. She asserts this "promise" is a "term, condition or privilege of employment" protected by section 703(a)(1) and/or an "employment opportunity" protected by section 703(1)(2).[11] She suggests that as an associate/employee, she was "entitled" to the "promotion" to partnership upon satisfactory fulfillment of her duties and denial of partnership is a denial of an "employment opportunity." Relying on *Golden State Bottling Co., Inc.* v. *NLRB*, 414 U.S. 168, 94 S.Ct. 414, 38 L.Ed.2d 388 (1973) and *NLRB* v. *Bell Aircraft Corp.*, 206 F.2d 235 (2d Cir. 1953), she advises us that should we decline to equate partners with employees, we may still find the "opportunity" for promotion within the statute's purview.

We have no quarrel with the premise that an "opportunity" can include promotion to a position beyond that of an "employee" covered by Title VII. But, once again, we decline to extend the meaning of "employment opportunities" beyond its intended context by encroaching upon individuals' decisions to voluntarily associate in a business partnership.

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[11] 42 U.S.C. § 2000e-2(a)(1) & (2) (1976) provide:

> (a) It shall be unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

For our purposes, we will simply refer to both sections as covering "employment opportunities."

In *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir.), *rehearing en banc denied*, 494 F.2d 1296 (5th Cir. 1974), the former Fifth Circuit held that election to a Board of Operatives had been appropriately labeled by the District Court as "a valuable term, condition, or privilege of employment." The case is unique, however, due to the manufacturing company's organizational structure. The company's owner had devised an unusual management plan which set up a Board of Management and a Board of Operatives. The Board of Operatives served as a conduit between the employees and the management board. Employees working in nonsupervisory positions were eligible for election to the Board of Operatives. Upon his death the owner bequeathed all outstanding common stock to the boards as trustees for the employees. Prior to the case, blacks had been intentionally excluded from eligibility for election to the Board of Operatives. Because the court found election to the Board of Operatives to be "a valuable term, condition, or privilege of employment," it ordered the discrimination terminated.

The appellant submits that *Pettway* demonstrates the former Fifth Circuit's willingness to mandate nondiscriminatory elections to positions of ownership from an employee status. The decision in *Pettway* does not possess such elasticity. The employees remained employees even while serving on the board and never actually "owned" the company in their individual capacities, but acted "in trust" for all present and future employees. Furthermore, the owner's elaborate management structure caused election to the board to become a "valuable term, condition, or privilege of employment." We do not find *Pettway* controlling in the issue now before us.

We are also cognizant of *Lucido* v. *Cravath, Swaine & Moore*, 425 F.Supp. 123 (S.D.N.Y.1977). In *Lucido*, the District Court denied a motion to dismiss a complaint alleging an unlawful discharge of an associate on the basis of his national origin and religion. Many of the allegations in the appellant's complaint mirror allegations described in *Lucido*.

Among them was a denial of partnership. "In [that] court's view, . . . the opportunity to become a partner at Cravath was a 'term, condition or privilege of employment' and an 'employment opportunity.' " *Id.* at 127. This statement could be classified as dicta since the court had already determined that the allegation of an unlawful discharge stated a claim for relief under Title VII. In any event, we respectfully disagree with that court's statement.[12] Decisions as to who will be partners are not within the protection of Title VII.

We do have serious concerns about any representations made to the appellant regarding her future consideration for partnership. We are well aware of the significance given a firm's partnership policy by a prospective associate in determining the proper career choice. If in fact these representations were deceptively made, then perhaps an action in breach of contract or misrepresentation may provide a more appropriate vehicle for the appellant to drive toward a legal remedy.[13]

In Through The Back Door

In her third attempt to establish a cause of action under Title VII, the appellant has attempted entry through the proverbial back door. She contends that regardless of our decision on the partnership issue she has been denied "employment oppor-

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[12] It appears the *Lucido* case has come to an end. According to the Clerk's Office for the Southern District of New York, the case was dismissed with prejudice on July 28, 1981.

[13] The appellant alleges King & Spalding also deprived her of employment opportunities by giving her less responsible work assignments, which prevented her from proving her value to the firm. *See Satz* v. *ITT Financial Corp.*, 619 F.2d 738 (8th Cir. 1980). Because she has elected to refrain from litigating these individual instances as violations of Title VII, we go no further.

tunities" in the firm's implementation of its "up or out" policy. In essence, she asserts the effect of the denial of partnership, subsequent termination of employment, deprived her of employment opportunities (frozen salary) and adversely affected her status as an employee (termination). 42 U.S.C. § 2000e-2(a)(2) (1976). While discriminatory termination alone may have stated a cause of action under Title VII for an unlawful discharge, *Lucido* v. *Cravath, Swaine & Moore,* when the termination is a result of the partnership decision, it loses its separate identity and must fall prey to the same ill-fate as her original attempt to apply Title VII to partnership decisions.

Prospective associates are apprised not only of their potential for partnership, but also of the consequences to be suffered following an unfavorable decision. Just as she accepted a representation made to her concerning partnership consideration, appellant likewise assumed the risk that an unfavorable decision would set in motion the termination procedure under the firm's "up or out" policy.

The End

Appellant creatively designed a new jurisdictional adventure for this Court to undertake. We have explored the new and intriguing trails, but find that each trail comes to a dead end. Title VII does not apply to those decisions dealing with the formation of partnerships. The dismissal is affirmed.

TJOFLAT, Circuit Judge, dissenting:

In 1972, Elizabeth Hishon accepted a position as an associate with King & Spalding, a large Atlanta law firm which operates as a general partnership. The partnership consists of approximately fifty active lawyers and employs approximately fifty additional lawyers as associates. At the time Hishon joined the firm, an associate was subject to discharge at the end of her sixth year. The firm also maintained an "out or up" policy whereby an associate who was not discharged at the end of the sixth year was invited to become a partner in the firm.

In May 1978, the partnership evaluated Hishon, along with other associates hired in 1972, and decided to discharge her from the firm; this of course rendered Hishon ineligible for partnership. She was promptly notified, and was granted the usual period of time to secure other employment. Eight months later, Hishon requested reconsideration of her discharge. At the conclusion of the May 1979 associate review meeting, the result was the same—Hishon's discharge was confirmed. She left the firm on December 31, 1979.

This account of the process culminating in Elizabeth Hishon's departure from King & Spalding differs from the majority's only verbally. See *ante* majority opinion at 1024. The majority says that King & Spalding decided not to invite Hishon to become a partner, and that by operation of the firm's uniformly applied "up or out" policy, Hishon incidentally had to leave the firm. The alternative account says that King & Spalding decided to fire Hishon, and that she was consequently not eligible for partnership.

The alternative is offered *not* to insinuate that the partners conspired to get rid of Hishon under the guise of denying her partnership. Rather, it is offered to suggest that in reviewing the district court's dismissal of Hishon's complaint, we should be concerned with the reality of the events alleged, and not with the conventional verbal garb in which those events are cloaked.

What "actually happened" is neither what the majority says happened nor what the alternative says happened. So far as we should be concerned, what happened is that the King & Spalding partnership, having reviewed and evaluated Hishon's performance, made a decision which they communicated to her. The *direct* consequence of this decision, mediated neither by Hishon's will nor by any cause other than the partnership itself, was to deny Hishon membership and to terminate her employment. Regardless the words by which we know the decision, the decision was, undeniably, to discharge Hishon.

Hishon alleges, and we must assume, that King & Spalding discriminated against her on account of her sex by its decision to deny her partnership and to terminate her employment. The majority holds that ". . . when the termination is a result of the partnership decision, it loses its separate identity and must fall prey to the same ill-fate as her original attempt to apply Title VII to partnership decisions." This is too glib for me. While I agree that Title VII would not apply to the discrete decision whether to take on a new partner,[1] when the partnership decision inextricably and inevitably *is* a decision whether to terminate employment, I would hold that Title VII applies. Since this is such a case, I would reverse the district court's dismissal of Hishon's complaint and remand for further proceedings. I dissent.

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[1] For example, Title VII would not apply to the partnership's invitations to lawyers who were not associates in the firm.

APPENDIX B

Elizabeth Anderson Hishon, Plaintiff v. King & Spalding, Defendant.

United States District Court, Northern District of Georgia, Atlanta Division. Civil Action No. C80-326A. November 25, 1980.

EDENFIELD, D.J.: Plaintiff in this action seeks relief for alleged sex discrimination because she was not elevated to partnership in the defendant law firm. The case is before the court on defendant's motion to dismiss on the ground that in selecting partners the defendant is not subject to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e to 2000e-17, and, more immediately, on plaintiff's prayer for further discovery as to the question of coverage under the Act. Both parties have filed voluminous briefs nominally addressed to the discovery question but which explore the whole coverage issue from almost every conceivable angle. The court is therefore now prepared to rule on both motions.

In her briefs on coverage plaintiff does not contend that Title VII applies to all law partnerships in selecting new partners. What she does contend is that this particular partnership, because of its age, its size, and the provisions of its partnership agreement, is not in substance a partnership at all but more nearly resembles a giant corporation, operating under a trade name (both of the partners for whom it was named having died long ago) and having a virtually perpetual existence as a separate institution quite apart from its individual members. For this reason she says new and junior partners (at least) are nothing more than employees and hence amenable to Title VII.

The defendant in its brief admits that as a partnership King and Spalding has an existence apart from its individual members but says, first, that partners are not "employees" within the

meaning of Title VII and, second, that admission to partnership is not a "term, condition or privilege of employment," to which that Act relates.

In the view of the court these contentions raise two legal questions: (1) Could Congress, under the Constitution, subject voluntary partnerships to Title VII; and (2) If so, did they intend to do so in enacting that chapter? In the opinion which follows the court will consider the answer to both questions, but its final conclusion will rest on the answer to question (2).

In 1964 in his concurring opinion in *Bell* v. *Maryland,* 378 U.S. 226, 313 (1964), and in distinguishing discrimination in places of public accommodation, Mr. Justice Goldberg said:

> Prejudices and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and *business partners* solely on the basis of personal prejudices including race. These and other rights pertaining to privacy and private association are themselves constitutionally protected liberties.

(Emphasis added.)

Admittedly, the kaleidoscope of civil rights has changed greatly since 1964, but until this very hour, so far as the court can find, private clubs and associations—social, business and otherwise—still enjoy this same constitutional protection and immunity or "freedom of association", some of them in fact being created for and dedicated to the protection and advancement of only one race or one sex; *e.g.,* the NAACP, the International Ladies' Garment Workers' Union, and the National League of Women Voters. *See NAACP* v. *Alabama,* 357 U.S. 449 (1958). Admittedly, many of these voluntary associations have abolished discrimination and accept members of both sexes and all races. So have many private clubs and so have many law partnerships, but they have done so voluntarily and not because of any recognition that the law requires it.

Undeniably, a private professional partnership is a voluntary association. The requirements of "voluntariness" and "association" are both part of any dictionary definition of the word "partnership" itself. Plaintiff's emphasis on the composition and internal arrangements of this particular partnership cannot alter this inescapable conclusion. King and Spalding is a partnership, created and perpetuated as such and subject to the partnership laws of Georgia and the United States. The legal characterization of what an entity is, of course, is purely a question of state law, and anyone denying that King and Spalding is a partnership would be laughed out of any court in Georgia, as well as the Internal Revenue Service, where it files partnership returns.

These observations effectively dispose of plaintiff's prayers for further discovery. In the further discovery sought plaintiff seeks to inquire into such matters as the amount of capital contribution required of the defendant's new partners, the amount of the firm's surplus and the interest of the various partners therein, the division of partnership points among each class of partners, and the amount of income derived therefrom by each. The answers to these questions would very likely make interesting reading to many people in Atlanta, to the members of the Atlanta bar, and to other competitors of King and Spalding, including both counsel in this case, but in the view this court entertains of this case they could make no difference in its outcome and consequently the information sought is simply none of plaintiff's business. The prayer for further discovery is therefore DENIED.

The Supreme Court has, of course, fully recognized "freedom of association." Unfortunately, however, it has not dealt with the subject in the context of business and commercial partnerships, except for the comments of Mr. Justice Goldberg

in *Bell* v. *Maryland, supra.* In *NAACP* v. *Alabama, supra,* at 460, Justice Harland for the majority, and after recognizing such freedom as a constitutional right, did say:

> Of course it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.

In a very real sense a professional partnership is like a marriage. It is, in fact, nothing less than a "business marriage" for better or worse. Just as in marriage different brides bring different qualities into the union—some beauty, some money, and some character—so also in professional partnerships, new mates or partners are sought and betrothed for different reasons and to serve different needs of the partnership. Some new partners bring legal skills, others bring clients. Still others bring personality and negotiating skills. In both, new mates are expected to bring not only ability and industry, but also moral character, fidelity, trustworthiness, loyalty, personality and love. Unfortunately, however, in partnerships, as in matrimony, these needed, worthy and desirable qualities are not necessarily divided evenly among the applicants according to race, age, sex or religion, and in some they just are not present at all. To use or apply Title VII to coerce a mismatched or unwanted partnership too closely resembles a statute for the enforcement of shotgun weddings.

It is also interesting that it is in connection with marriage that the Supreme Court next mentioned "freedom of association." In *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), it said:

> This law [relating to contraceptives], however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation. . . . In NAACP v. Alabama we protected the "freedom to associate and privacy in one's associations," noting that

> freedom of association was a peripheral First Amendment right. . . . The right of "association" like the right of belief is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. . . .
>
> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

It is against this background then that we must next address the question whether Congress, by the language used, intended to include the formation of partnerships, and the admission of new members to them, under Title VII in the first place. On this subject the language of the law is completely silent or ambiguous. The Act speaks only in terms of employment relationships and prohibits discrimination with respect to "compensation, terms, conditions or privileges of employment" and prohibits actions which would adversely affect one's "status as an employee." The word "employment" is not defined, "employee" is defined only as one "employed by an employer." "Employer" is likewise not defined except that in the legislative history it is said the word was to be given its "common dictionary meaning, except as qualified by the Act." Several cases have held that under Title VII "employment" meant the same thing it did at common law.

In this confusion the reported precedents help a little, but not much. In *Burke* v. *Friedman* [14 EPD ¶ 7629], 556 F.2d 867 (7th Cir. 1977), the Seventh Circuit held (headnote 2):

> Partners cannot be regarded as employees rather than as employers who own and manage operation of business and, hence, cannot be included as employees for obtaining necessary subject matter jurisdiction under statute authorizing a discriminatory employment suit against an employer engaged in an industry affecting commerce who have 15 or more "employees" for each working day in each of 20 or more calendar weeks in current or preceding calendar years. Civil Rights Act of 1964, § 701(b) as amended 42 U.S.C.A. § 2000e(b).

In the body of the opinion the court also said:

> [S]ection 6 of the Uniform Partnership Act defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit." Partners manage and control the business and share in the profits and losses. [Citations.] In light of the foregoing, we do not see how partners can be regarded as employees rather than as employers who own and manage the operation of the business.

At 869. Admittedly, although this case did involve the rights of partners inter se, it did not involve or discuss the case of an associate employee who complains of being denied partnership status.

The case of *Lucido* v. *Cravath, Swaine & Moore* [13 EPD ¶ 11,432], 425 F.Supp. 123 (S.D. N.Y. 1977), cited by plaintiff, can be distinguished on several grounds: In the first place, the first and main complaint of plaintiff there was that he was discharged *as an associate* because of his race and religion. This, of course, made out a Title VII claim by itself; but here, that is not what plaintiff complains of. She does not seek damages or reinstatement for being discharged as an associate,[1] her com-

plaint is that she was not made a partner. It is true that in divisions [7] and [8] of that opinion the district judge goes on to say that denial of promotion to partnership might itself be a Title VII violation. But having already found a violation for firing the associate, the court had to deny the motion to dismiss in any event and these remarks appear to be dictum. In the same portions of the opinion the court attempts to dispose of the freedom of association defense by asserting that such right is limited to social and fraternal organizations, not businesses. In the first place, not one of the Supreme Court cases cited as authority for that proposition either states or supports the distinction sought to be drawn; none of them dealt with either partnerships or Title VII but with schools and school books. Finally, and with all respect, this court is not bound by the opinion of that court anyway.

The author of *Lucido,* in reaching his conclusion, also relies on the acceptable proposition that Title VII applies to the promotion of one covered by the Act to a higher position which is not covered. But in applying the rule, the author erred, in the opinion of this court, because he confuses the process of promotion with the process of election. When a law firm associate becomes a partner he is not *promoted* to partnership, he is *elected* to partnership. The difference, this court thinks, should be obvious. A promising young lawyer who is elected to partnership is comparable to a promising young engineer working for the Chevrolet Division of General Motors who is elected to the board of directors of that corporation. This comparison, if apt, goes far toward resolving this case; this for the reason that the legislative history of Title VII clearly shows that the chapter was not intended to apply to the election of corporate directors.[2]

Nor does this case fall within the situation recently referred to by Judge Moye of this court,[3] where failure to promote or elect would destroy or jeopardize the future right of an employee to pursue his chosen life profession or occupation. On the contrary, just as a promising young engineer who is *not* elected to

the board of General Motors remains just as much a promising young engineer as before, so when plaintiff was *not* elected to partnership she remained just as much a promising young lawyer as before, as evidenced by the fact that she promptly made a connection with another large Atlanta firm. Defendant's "up or out" policy with respect to associates (of which plaintiff complains) is exactly the same, in principle, as the case of a young singer who tries out for the Metropolitan Opera or of an athlete who tries out for the Olympic Team and is not accepted. He or she is still just a much as genius as before but will simply have to seek stardom elsewhere. Many find it. It is an interesting sidelight, in this connection, that both leading counsel in this case, certainly among Atlanta's best, were once promising young associates in the same prestigious Atlanta firm. One was elected to partnership; the other was not. It may be interesting to speculate why both were not elected, but neither would every claim it was because of race, sex, age or religion. It is also irrelevant to this opinion, but is somewhat supportive, to note that since the filing of this action King and Spalding now has a female partner.

In the end, then, the court faces this dilemma: (1) If the court finds that the case is covered by Title VII the defendant's constitutional right to freedom of association is then thrown into head-on conflict with plaintiff's constitutional right not to suffer discrimination in the terms, conditions and privileges of her employment; (2) if the court construes the Act as not covering plaintiff's claim, then there is no constitutional problem and the court should dismiss the case for want of subject-matter jurisdiction. To the court, while the right of defendant to freedom of association seems clear, the coverage of the Act seems doubtful and obscure. The court is humbly aware that in reaching this conclusion it may have erred. In considering this possibility, the court considered a balancing process which

would give effect to both constitutional rights by allowing the case to proceed but would require the plaintiff, in such rare instances, to show by clear and convincing proof that, irrespective of all other justifications claimed by defendant, naked discrimination was the sole and producing cause of plaintiff's rejection as a partner. The court, however, could find no hint of any authority for a trial court to so alter the burden of proof. All of these questions will have to be resolved by a higher authority, legislative or judicial. In the meantime, the court concludes that it has no subject-matter jurisdiction of plaintiff's claim and the case is, therefore,

Dismissed.

—Footnotes—

[1] An unsigned draft of this order was mailed to counsel on November 10, 1980, along with a letter inquiring whether counsel wished a further hearing or argument on the question of coverage. In a reply from plaintiff dated November 18 requesting no further hearing plaintiff, however, does point to what she claims to be a misstatement of her contentions. In this letter plaintiff says that, contrary to the statement in the opinion, she *does* also complain of her discharge as an associate.

Despite the tenacity of plaintiff, the logic behind this contention simply will not cut the mustard under the undisputed facts. Admittedly, it was the policy of defendant law firm against permanent associates and its "up or out" rule with respect to them which caused plaintiff to lose her job as an associate. These long-standing policies of defendant have been uniformly applied by it over the years, for the most part against associates who were male only. Neither in her pleading, briefs nor arguments does plaintiff even whisper or suggest that such applications by defendant were in any way based on sex. The same provisions caused two males to leave at the same time as plaintiff, and plaintiff admits that, standing alone, these policies are not sexually discriminatory and were not discriminatorily applied by defendant. What she does say is that since her failure to make partner was in this case based on sex discrimination, and since this in turn triggered the "up or out" rule with respect to her, the "up or out" rule itself thereby becomes discriminatory in this instance. In other words, to make out discrimination under "up or out" she must first make out discrimination in denial of partnership. But having failed to establish her premise of actionable discrimination in denial of partnership, her second conclusion, based on that premise, cannot follow.

[2] 110 Cong. Rec. 7218 (1964).

[3] Naismith v. Professional Golfers Ass'n, 85 F.R.D. 552 (N.D. Ga. 1979).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 80-9021

D.C. Docket No. CV80-326-A

Elizabeth Anderson Hishon,
Plaintiff-Appellant,

vs.

King & Spalding, a Partnership,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia Before TJOFLAT and FAY, Circuit Judges, and YOUNG*, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, AFFIRMED;

---

* Honorable George C. Young, U.S. District Court Judge for the Middle District of Florida, sitting by designation.

It is further ordered that plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

June 17, 1982

TJOFLAT, Circuit Judge, Dissenting.

ISSUED AS MANDATE: September 9, 1982

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 80-9021

Elizabeth Anderson Hishon,
Plaintiff-Appellant,

vs.

King & Spalding, a partnership,
Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Georgia

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Filed September 9, 1982)

(Opinion June 17, 11 Cir., 1982, ____ F.2d ____).

(September 9, 1982)

Before TJOFLAT and FAY, Circuit Judges and YOUNG*, District Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court

---

* U.S. District Judge for the Middle District of Florida, sitting by designation.

having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ PETER T. FAY
United States Circuit Judge

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Office-Supreme Court, U.S.
FILED
MAY 9 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-940

In The
Supreme Court of the United States
October Term, 1982

ELIZABETH ANDERSON HISHON,
Petitioner,

vs.

KING & SPALDING,
Respondent.

On Certiorari To The United States Court of Appeals For The Eleventh Circuit

JOINT APPENDIX

EMMET J. BONDURANT
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In The

Supreme Court of the United States

October Term, 1982

ELIZABETH ANDERSON HISHON,

Petitioner,

vs.

KING & SPALDING,

Respondent.

On Certiorari To The United States Court of Appeals
For The Eleventh Circuit

JOINT APPENDIX

RELEVANT DOCKET ENTRIES

Date	Proceedings
1980	
Feb. 27	Complaint with Exhibit A and B filed.
28	Summons issued and delivered to USM.
Mar. 12	Marshal's return of service executed 3-11-80, filed.
25	Order transferring action from Judge O'Kelley to Judge Edenfield filed. Cy. to counsel.
31	ANSWER, filed.

Deft's motions to dismiss pltf's complaint w/ exhibits & brief, filed.

Deft's notice to take deposition of pltf, filed.

Apr. 2 Letter from pltf's counsel requesting in chambers conference, filed.

4 HEARING on question as to how discovery should proceed. Court *directed* that discovery proceed on the Title 7 issue only. Parties allowed 90 days to complete discovery. Counsel to prepare order. Court directed parties to prepare order that all pleadings other than complaint & answer be SEALED, that includes all pleadings to date & in the future. (all pleadings except complaint & answer SEALED 4-9-80).

18 Letter dated 4-16-80 to Hamilton Lokey from Emmet J. Bondurant RE: interrogatories. Pretrial instructions mailed to counsel.

24 ORDER that parties are granted 90 days in which to complete discovery limited to the threshhold issue, pltf have 30 days after completion of discovery to file brief or other response to deft's motions to dismiss directed to the threshhold issue & deft have 30 days thereafter to file response & that all other matters are stayed & deferred until further order of the court, c.c.

ORDER that all documents, responses to interrog. or requests for admissions, transcripts, depositions, all pleadings, aff'ids & briefs other than pltf's complaint & deft's answer shall be maintained in strictest confidence & ***FILED UNDER SEAL*** pending further order of this Court & after date of this order, cc.

May 12 Proposed consent order for extension of time for deft to respond to pltf's interrog. & notice

to produce, rec'd. (no extension needed as interrog. in NE's office & not rec'd in Clerk's office til 5-16-80).

16 INTERROG. of pltf. (Vault 118).

FIRST notice to produce of pltf. (Vault 118). MOTION of Equal Employment Opportunity Commission for leave to participate as amicus curiae w/memo & proposed order. (Vault 118).

27 RESPONSE of deft to pltf's first notice to produce. (Vault 118).

MEMO of deft in opposition to motion of Equal Opportunity Commission to participate as amicus curiae. (Vault 118).

RESPONSES & OBJECTIONS of deft to certain of pltf's first interrog. (Vault 118).

June 09 REPLY memo by EEOC in support of mot. to participate as amicus curiae. (Vault 118).

16 SUBMITTED ON MOTION OF EQUAL EMPLOYMENT OPPORTUNITY COMMISSION FOR LEAVE TO PARTICIPATE AS AMICUS CURIAE.

23 MOTION of pltf to compel deft to produce documents & to answer w/brief.

30 ORDER DENYING in part & GRANTING in part EEOC's motion to participate as amicus curiae, cc 7-1-80.

July 14 LETTER dated Jul. 7, 1980 form Gerald F. Handley re: ext. to 7-17-80 for response to motion to compel.

Orig. File to NE

17 SUBMITTED ON PLTF'S MOTION TO COMPEL DEFT TO PRODUCE DOCUMENTS & TO ANSWER INTERROGS.

21 RESPONSE of deft to the motion of Equal Employment Opport. Commiss. for modifica-

tion of Court order Granting leave to participate as Amicus Curiae. NE.

17 BRIEF of defts in opposition to pltf's motion to Compel. NE.

MOTION of Equal Employment Opport. Comm. for Modification of Court Order Granting Leave to Participate as Amicus Curiae w/Proposed order. NE.

23 SUBMITTED ON MOTION OF EQUAL EMPLOYMENT OPPORT. COMM. FOR MODIFICATION OF COURT ORDER GRANTING LEAVE TO PARTICIPATE AS AMICUS CURIAE.

30 ORDER DENYING EEOC's motion to modify the court's order of June 30, 1980. (c to c) NE

31 PRE TRIAL INST. MAILED.

MOTION of pltf to ext. time for disc. w/approval to Sept. 8, 1980. (c to c).

Nov. 26 ORDER DISMISSING action as court concludes that it has no subject matter jurisdiction of pltf's claim, cc & FOD 11-28-80.

JUDGMENT ENTERED for the deft & against the pltf, cc & EOD 11-28-80.

Dec. 1 NOTICE OF APPEAL (Pltf's). (Bond & Fees paid) c:c cert'd c. ntc & dkt:USCA 12/3.

Dec. 15 Letter dated 12/8/80 from USCA requesting record "Forthwith".

1981

Jan. 2 Letter dated 12/30/80 from USCA requesting record "Forthwith".

Jan. 8 RECORD ON APPEAL TO USCA, RRR.

ELEVENTH CIRCUIT COURT OF APPEALS

1/13/81 Motion of EEOC for access to the record on appeal.

1/20/81 Appellee's opposition to motion of EEOC for access to the record on appeal.

2/19/81 Order that motion of amicus curiae, EEOC to have access to the record is CARRIED WITH THE CASE.

3/24/81 Appellee's motion to place all briefs relative to this appeal under protective order.

3/30/81 Order granting appellee's motion to place all briefs relative to this appeal under seal.

1/6/81 Motion of EEOC for leave to participate in oral argument amicus curiae on independent time.

1/11/82 Response of appellee, King & Spalding, to motion of EEOC to participate in oral argument as amicus curiae on independent time.

1/14/82 Order granting motion of EEOC for leave to participate in oral argument as amicus curiae on independent time.

1/18/82 Letter of appellee regarding clarification of a matter which arose during oral argument in this case.

2/1/82 Motion of appellant for leave to file letter in response to letter of appellee.

2/4/82 Response of appellee to appellant's motion to file with the court her letter dated 1/25/82.

2/18/82 Order granting motion of appellant for leave to file letter in response to letter of appellee.

7/16/82 Motion of amicus curiae, EEOC, for leave to file a brief in support of the petition for rehearing en banc.

8/4/82 Order granting motion of EEOC for leave to file a brief as amicus curiae in support of appellant's petition for rehearing en banc.

COMPLAINT

The complaint of the plaintiff for damages and injunctive relief to redress unlawful acts of sex discrimination on the part of the defendant, in violation of Title VII of the Civil Rights Act of 1964 (42 U. S. C. §§ 2000e *et seq.*), and for other relief, respectfully alleges the following facts:

1.

Plaintiff Elizabeth Anderson Hishon is a female citizen of the United States and the State of Georgia and is actively engaged in the practice of law in Atlanta, Georgia, as a member in good standing of the State Bar of Georgia.

2.

(a) Defendant King & Spalding is a general partnership engaged in the practice of law in interstate commerce with its principal offices in Atlanta, Georgia, and an office in Washington, D. C., from which the defendant represents on a national basis many clients that are also engaged in interstate commerce.

(b) King & Spalding consists of 52 partners and employs approximately 50 other lawyers known as "associates," and more than 50 non-legal personnel in secretarial and other positions, and is an "employer" within the meaning of 42 U. S. C. § 2000e(b).

(c) Defendant King & Spalding is one of Atlanta's oldest and largest law firms, that traces its origins and continuing existence under different names to a firm that was founded in the 1870's under the name "King & Spalding"; during the 100 year history of the firm, King &

Spalding has never admitted a woman to partnership in the firm.

3.

Jurisdiction and venue of Count One of this action is conferred upon this Court by Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-5(f) (3), and by 28 U. S. C. § 1331; jurisdiction of Count Two is conferred by the Equal Pay Act, 29 U. S. C. § 216(b) and 28 U. S. C. § 1337; the Court has pendent jurisdiction of Count Three of the complaint.

COUNT ONE

4.

Defendant has unlawfully discriminated against plaintiff with respect to her compensation, terms, conditions and privileges of employment and employment opportunities because of plaintiff's sex in violation of §§ 703(a) (1) and (2), 704(a) of Title VII of the Civil Rights Act of 1964 (42 U. S. C. §§ 2000e-2 (a)(1) and (2), 2000e-3)), as more fully set forth in the succeeding paragraphs of Count One of her complaint.

5.

Plaintiff is a graduate of Wellesley College, from which she received a bachelor of arts degree in 1966, and of the Columbia University School of Law, from which she graduated with a juris doctor degree in 1972. Throughout her academic career, plaintiff's academic excellence was recognized by the receipt of various honors, including her designation as a Harlan Fiske Stone Scholar at Columbia University Law School.

6.

Plaintiff was admitted to practice before the Supreme Court, Court of Appeals and Superior Courts of Georgia in 1972, and has been a member in good standing of the State Bar of Georgia since that date; plaintiff has also been active in the affairs of the organized Bar as a member of the Atlanta, Georgia and American Bar Associations, and has served as Chairman of the State Bar Lawyer Referral Committee, and is a member of the Lawyers Club of Atlanta.

7.

Prior to plaintiff's graduation from the Columbia University Law School in 1972, plaintiff received approximately ten offers of employment from outstanding law firms, in New York and Atlanta, including an offer of employment from defendant King & Spalding.

8.

At the time of her initial interview and recruitment by King & Spalding in 1972, and continuously thereafter, King & Spalding has represented to plaintiff and to other law students, and young lawyers whom the firm was seeking to employ, that:

(a) King & Spalding employs association attorneys of generally high academic standing and professional promise usually upon graduation from law school or at some reasonable time thereafter.

(b) King & Spalding was committed to the employment of new lawyers as "associates" with the expectation that the associate lawyer will be promoted and become a

partner in the defendant firm on a fair and equal basis and within a reasonable period of time, which was represented to be after a period of 5-6 years' employment.

(c) King & Spalding will make annual evaluations of the associate's progress toward partnership and will truthfully advise the associate of the results of those evaluations.

(d) Associates who receive satisfactory evaluations from the firm will be promoted and made partners in the firm as a matter of course after the five or six year period of apprenticeship.

9.

In reliance upon the representations and assurances from the defendant described in paragraph 8 above, plaintiff accepted the offer of employment of defendant King & Spalding and thereafter continued in the employ of the firm as an attorney in the firm's real estate department from April 3, 1972, until her discharge on December 31, 1979.

10.

During the plaintiff's employment by the defendant law firm, plaintiff and the defendant firm received many letters from clients of the firm and memoranda and comments from partners complimenting plaintiff on the quality of her professional representation.

11.

Throughout the plaintiff's employment by the defendant law firm, and continuing as recently as the evaluation in approximately November 1976, defendant law firm

advised plaintiff at her annual evaluations that her work was entirely satisfactory, that she was at the top of the class of associates who were considered to be probable candidates for promotion to partnership, and that she had every reason to be optimistic as to her prospects for promotion to partnership; plaintiff was never told by the firm as a part of its evaluation process that he work was unsatisfactory or that she had failed to perform professionally at the expected level to become a partner in the firm.

12.

Despite the prior assurances that plaintiff had received from defendant, plaintiff was not promoted by the defendant at its annual meeting in May 1978; following that meeting, plaintiff was assured by partners in her department that, to the contrary, the quality of her work had been judged to be excellent, that the reasons for her failure to receive a promotion were not based on any deficiencies in her performance as a lawyer, or personally, and was further assured by the senior member of the defendant's management committee that she would again be considered for promotion to partnership at the next annual meeting of the defendant in May 1979.

13.

In May 1979, defendant failed and refused to promote plaintiff to the position of partner in the defendant law firm, and thereafter notified plaintiff of defendant's intention to terminate her employment on December 31, 1979, and failed and refused to give plaintiff the same salary increases and cost-of-living adjustments on the same

basis as such increases and adjustments were made by the defendant in the compensation paid to its other employee-attorneys.

14.

The actions of the defendant described in paragraphs 11, 12 and 13 above were not based upon any objective criteria or any documented deficiencies in the professional quality of plaintiff's work, which was at least equal to that of some of the male lawyers who were promoted to partnership during the seven years that plaintiff was employed by defendant.

15.

The actions of defendant in denying plaintiff's promotion, in withholding salary and cost-of-living adjustments, and ultimately in terminating plaintiff's employment constituted unlawful acts of discrimination against plaintiff because of her sex, in violation of Title VII of the Civil Rights Act of 1964, and were in furtherance of an established custom, practice and policy of defendant law firm that has existed for over 100 years of excluding women entirely from partnership, or, in the alternative, of applying to women lawyers as a class, and to plaintiff in particular, higher standards for promotion to partnership than King & Spalding has required of male lawyers.

16.

Defendant has unlawfully, and in violation of 42 U. S. C. §§ 2000e-2(a) (1), 2000e-2(a) (2) and 2000e-3:

(a) discriminated against plaintiff in terms, conditions, privileges, opportunities and compensation of her employment on account of her female sex;

(b) limited, segregated and classified her in ways which deprived and tended to deprive her of employment opportunities and otherwise adversely affected her status as an employee on account of her sex; and

(c) discriminated against her for opposing practices made unlawful by Title VII.

17.

Without limiting the generality of the foregoing allegations, these unlawful actions of sex discrimination by defendant against plaintiff have been accomplished by the following and other circumstances:

(a) Defendant failed and refused to offer plaintiff a promotion to partnership on and after May 25, 1979, despite her having performed all lawful and necessary requirements for attaining such status;

(b) Defendant failed and refused to give plaintiff a raise or a cost-of-living increase, or either, in salary on and after January 1, 1979, and continuously ever since;

(c) Defendant discharged plaintiff as its employee effective December 31, 1979; and in retaliation for her having exercised the legal and equitable rights granted by Title VII of the Civil Rights Act of 1964 by filing a charge with the Equal Employment Opportunity Commission as more fully alleged in paragraph 18 below, defendant attempted to coerce plaintiff to vacate the premises and abandon her work for clients before December 31, 1979, and withdrew an offer of settlement when she failed to comply with this demand:

(d) Defendant failed and refused to assign sufficient junior associates to work under plaintiff on matters for which she was given responsibility, and failed and refused to give plaintiff responsibility for matters that would require that she work closely with other associates, all to insulate plaintiff from other associates of the firm;

(e) Defendant failed and refused to give plaintiff work assignments that would contribute to her career advancement;

(f) To the extent that lawful and necessary criteria were used, defendant failed and refused to evaluate plaintiff's performance in the same manner that defendant evaluated the performance of its male employees;

(g) Defendant set and applied standards for partnership which adversely impacted female lawyers as a class (including plaintiff) and which were not and are not justified by any business necessity or even job-relatedness;

(h) Defendant set and applied standards for partnership to plaintiff as a female which were not applied to at least some of her male peers; and

(i) To the best of plaintiff's knowledge, defendant failed to take adequate affirmative action to eradicate the present effects of past and current discrimination practiced by the defendant law firm against female lawyers generally and to create a work environment which is at least equally conducive to the progress of female lawyers toward partnership as defendant provided for male attorneys.

18.

(a) On November 19, 1979, plaintiff filed a timely Charge of Discrimination to the Equal Employment Opportunity Commission ("EEOC") regarding the matters complained of herein, a true and correct copy of which is attached hereto as Exhibit A and is incorporated herein by reference.

(b) On November 29, 1979, the EEOC, in accordance with its administrative regulations, issued the Notice of Right to Sue to plaintiff, a true and correct copy of which is attached hereto as Exhibit B and is incorporated herein by reference.

(c) Efforts by the parties at conciliation have been unsuccessful, and further efforts at conciliation would be futile.

(d) This action has been instituted within the time prescribed by law.

19.

Plaintiff has been severely damaged professionally, emotionally and monetarily as a direct result of the unlawful acts of discrimination of defendant, for which she can be only partially compensated in an action at law for damages.

WHEREFORE, plaintiff respectfully prays that this Court: –

(a) Declare illegal the actions of defendant toward plaintiff as described in Count One of the complaint to have been violative of Title VII of the Civil Rights Act of 1964;

(b) Award plaintiff back pay from November 19, 1977, until the date of entry of judgment herein;

(c) Award plaintiff compensation for her future loss of earnings as a result of the defendant's unlawful acts in lieu of reinstatement and promotion to partnership;

(d) Award plaintiff her reasonable attorneys' fees, costs and expenses; and

(e) Grant plaintiff such other and further relief as may be just and proper in the premises, including, but not limited to, a permanent injunction against further acts of disparagement and discrimination by defendant by reason of her sex or exercise of rights granted by Title VII.

COUNT TWO

20.

Plaintiff hereby incorporates by reference the allegations of paragraphs 4 through 19 above as allegations of this paragraph 20 of Count Two of the complaint.

21.

On information and belief, plaintiff avers that defendant has wilfully discriminated in the payment of compensation on the basis of sex between plaintiff and male attorneys employed by the defendant in violation of the provisions of the Equal Pay Act amendments to the Fair Labor Standards Act, 29 U. S. C. § 206(d) (1).

22.

Plaintiff has given her written consent to the filing of this complaint in the verification attached hereto as required by 29 U. S. C. § 216(b).

WHEREFORE, plaintiff respectfully prays that:

(a) The Court declare the defendant's action with reference to the plaintiff to have been a wilful violation of the Equal Pay Act amendments, 29 U. S. C. § 206(d) (1); and

(b) The Court award plaintiff such damages as she may be shown by the evidence, after discovery, to have sustained or otherwise be entitled to, together with reasonable attorneys' fees and costs in conformity with 29 U. S. C. § 216(b).

COUNT THREE

23.

Plaintiff hereby incorporates by reference the allegations of paragraphs 4 through 22 above as allegations of this paragraph 23 of Count Three of the complaint.

24.

Defendant has breached the terms and conditions of its contract of employment with plaintiff which was fully performed on the part of the plaintiff.

25.

Because of defendant's breach of contract, plaintiff has been damaged in an amount which plaintiff believes will substantially exceed $100,000.

WHEREFORE, plaintiff respectfully prays that she have and recover judgment under Count Three of her complaint for the amount of damages as she may be shown by the evidence to have sustained as a result of the defend-

ant's breach of contract, the costs of this action, and such other and further relief as may be just.

/s/ Emmet J. Bondurant
/s/ Jeffrey M. Smith

Attorneys for Plaintiff

EXHIBIT A

E.E.O.C. Charge No.____

CHARGE OF DISCRIMINATION

TO: The Equal Employment Opportunity Commission

A. I, ELIZABETH ANDERSON HISHON, charging party, do hereby charge that:

CHARLES L. GOWEN
HUGHES SPALDING, JR.
JAMES M. SIBLEY
CHARLES H. KIRBO
GRIFFIN B. BELL
JOHN IZARD
POPE B. McINTIRE
KIRK M. McALPIN
FRANK C. JONES
RICHARD A. DENNY, JR.
HARRY C. HOWARD
WILLIAM H. IZLAR, JR.
R. BYRON ATTRIDGE
BRADLEY HALE
ROBERT W. HURST
ROBERT L. STEED
HENRY HALL WARE, III
DANIEL J. O'CONNOR, JR.
HUGH PETERSON, JR.
JOHN A. WALLACE
EDWARD J. HAWIE
JOHN C. STATON, JR.
DAVID LEE COKER
JOHN D. HOPKINS
A. FELTON JENKINS, JR.
G. LEMUEL HEWES
HORACE H. SIBLEY
CHARLES M. SHAFFER, JR.
W. DONALD KNIGHT, JR.

JOSEPH R. GLADDEN, JR.
JAMES H. WILDMAN
JOSEPH B. HAYNES
HERSCHEL M. BLOOM
MICHAEL C. RUSS
CHARLES H. BATTLE, JR.
WALTER W. DRIVER, JR.
RUSSELL R. FRENCH
GEORGE H. LANIER
LANNY B. BRIDGERS
CLARENCE HAVERTY RIDLEY
WILLIAM A. CLINEBURG, JR.
RICHARD G. WOODWARD
THEODORE M. HESTER
WILLIAM F. NELSON
JAMES A. RUBRIGHT, JR.
JOSEPH R. BANKOFF
JOHN TRAPNELL GLOVER
DONALD S. KOHLA
NOLAN C. LEAKE
RALPH B. LEVY
CHARLES H. TISDALE, JR.

and KING & SPALDING, a partnership, which employs more than 100 persons, and all of the prior and future partners in King & Spalding who acquiesce or acquiesced in the patterns, practice and employment decisions hereafter described,

Respondents, all of which individuals (and others) are partners in the law firm of King & Spalding, located at 2500 Trust Company Tower, Atlanta, Georgia, 30303, telephone no. 404-572-4600 and at 1800 M. St., N.W., Washington, D. C., 20036, telephone no. 202-466-7640, and each of whom is my employer, have jointly, severally, intentionally and unlawfully, and in violation of 42 U. S. C. 2000e ("Title VII"):

1. discriminated against me on account of my female sex by announcing a decision to discharge me as an employee; and

2. limited, segregated and classified me in ways which deprived me of employment opportunities and otherwise adversely affected my status as an employee on account of my female sex; and

3. discriminated against me for opposing practices made unlawful by Title VII, and;

4. set and applied standards for partnership which adversely impact females (including myself) and which are not a business necessity; and

5. set and applied partnership standards to me as a female which were not applied to at least some of my male peers; and

6. to the best of my knowledge have failed to take adequate affirmative action to eradicate the present effects of past and current discrimination against females and to create a work environment which is as conducive to female progress toward partnership as is provided for non-jewish white males; and

7. held numerous business and other official firm functions at discriminatory, including sexually, private clubs; and

8. ignored and failed to comply with such manifest Title VII obligations as displaying the posters required by Title VII with respect to applicants for employment; and

9. failed and refused to comply with obligations to females, including myself, under Executive Order 11246.

B. In particular, but without limiting the generality of the foregoing allegations, these unlawful actions by Respondents against me have been accomplished by the following and other circumstances:

i. Respondents failed and refused to offer me a promotion to partnership on and after May 25, 1979, despite my having performed all lawful and necessary requirements for attaining such status;

ii. Respondents failed and refused to give me a raise or a cost-of-living increase, or either, in salary on and after January 1, 1979 and continuously ever since;

iii. Respondents have announced an intention to discharge me as their employee, effective December 31, 1979;

iv. Respondents failed and refused to assign sufficient associates to work under me on matters for which I was given responsibility;

v. Respondents failed and refused to give me work assignments that would contribute to my career advancement;

vi. To the extent that lawful and necessary criteria were used, Respondents failed and refused to evaluate my performance as their employee on the same basis as the performances of their male employees were evaluated.

C. All of the foregoing have been done pursuant to a continuing policy and practice of discrimination in employment by Respondents against females, as well as against minorities and persons of the Jewish faith or origin.

Further, charging party brings this Charge of Discrimination on behalf of a class of females who have been employed or who have sought employment with Respondents as attorneys, and who have been subjected to the pattern, practice and policy of Respondents to make hiring, promotional, other employment decisions regarding persons employed by them or who seek employment with them

as attorneys because of such persons' sex and disadvantageously to persons of the female sex.

I will advise you if I change my address or telephone number and I will cooperate fully with you in the processing of my charge in accordance with your procedures.

No proceeding in or arising out of these unlawful employment practices has been commenced before any state or local agency charged with enforcement of fair employment practice laws.

My attorneys in this matter are:

George Daly
700 Law Building
Charlotte, N. C. 28202
704-376-7461

Julius Chambers
John Gresham
Chambers, Stein, Ferguson & Becton
Independence Plaza Building
951 S. Independence Blvd.
Charlotte, N. C. 28202
704-375-8461

I request expedited handling and any necessary help to preserve the status quo pending a full investigation and administrative determination of my claims.

/s/ Elizabeth Anderson Hishon
147 15th St., N. E.
Atlanta, Georgia 30361
404-885-1249

STATE OF GEORGIA

COUNTY OF FULTON

Elizabeth Anderson Hishon, being first duly sworn, says that she has read the foregoing Charge of Discrimination and the same is true of her own knowledge, and so declares under penalties of perjury.

/s/ Marjorie D. Stansel
Notary Public

My Commission Expires: 7-24-81

EXHIBIT B

Equal Employment Opportunity Commission

NOTICE OF RIGHT TO SUE
(Issued on Request)

TO:

Elizabeth A. Hishon
147 15th Street, N. E.
Atlanta, Georgia 30361

FROM:

Equal Employment Opportunity Commission
Citizens Trust Bank Building
75 Piedmont Avenue, N. E.
Suite 1000
Atlanta, Georgia 30303

Charge Number: 041800388

EEOC Representative: Betty A. Adams

Telephone Number: 404/221-6091

(See Section 706 (f) (1) and (f) (3) of the Civil Rights Act of 1964 on reverse of this form.)

This is your NOTICE OF RIGHT TO SUE. It is issued at your request. If you intend to sue the respondent(s) named in your charge YOU MUST DO SO WITHIN NINETY (90) DAYS FROM THE RECEIPT OF THIS NOTICE: OTHERWISE YOUR RIGHT TO SUE IS LOST.

( ) **More than 180 days have expired since the filing of this charge.**

(X) **Less than 180 days have expired since the filing of this charge, but I have determined that the Commission will be unable to complete its administrative**

process within 180 days from the filing of the charge.

(X) With the issuance of this Notice of Right to Sue the Commission is terminating any further processing of this charge.

( ) It has been determined that the Commission will continue to process your charge.

If you cannot afford or have been unable to obtain a lawyer to represent you, you should be aware that the Civil Rights Act of 1964, as amended, 42 U. S. C. 2000e-5(f) (1) permits the U. S. District Court having jurisdiction in your case to appoint a lawyer to represent you. If you plan to request appointment of a lawyer to represent you, you must make this request of the U. S. District Court in the form and manner it requires. *Your request to the U. S. District Court should be made well in advance of the end of the 90-day period mentioned above.*

You may contact the EEOC representative named above if you have any questions about your legal rights including advice on which U. S. District Court has jurisdiction to hear your case or if you need to inspect and copy information contained in the Commission's case file.

An information copy of the Notice of Right to Sue has been sent to the respondent(s) shown below.

On Behalf of the Commission
/s/ Betty A. Adams
District Director, ATDO

(*Typed Name and Title of EEOC Official*)

November 29, 1979
(*Date*)

cc: King and Spalding

VERIFICATION

STATE OF GEORGIA)
COUNTY OF FULTON)

PERSONALLY APPEARED before me, the undersigned officer, duly authorized to administer oaths, Elizabeth Anderson Hishon, who, being first duly sworn, on oath deposes and says that she is the plaintiff named in the within and foregoing complaint and that the facts stated in the complaint are true and correct.

/s/ Elizabeth Anderson Hishon

ANSWER

NOW COMES DEFENDANT KING & SPALDING and, for its answer to plaintiff's complaint, states as follows:

FIRST DEFENSE

Plaintiff's complaint fails to state a claim against defendant upon which relief can be granted.

SECOND DEFENSE

Plaintiff's claims under Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e, et seq. ("Title VII") are barred in that plaintiff did not file a charge of discrimination with the Federal Equal Employment Opportunity Commission ("EEOC") within 180 days of the alleged discriminatory acts.

THIRD DEFENSE

Plaintiff's claims under Title VII are barred to the extent that the alleged discriminatory acts occurred more than 180 days before plaintiff filed her charge of discrimination with the EEOC and to the extent that plaintiff failed to file a charge of discrimination with the EEOC respecting an alleged discriminatory act.

FOURTH DEFENSE

Plaintiff's claims under Title VII regarding her not being invited to become a partner by defendant are barred because an invitation to partnership is not an employment practice which is subject to Title VII.

FIFTH DEFENSE

Plaintiff's claims under Title VII are barred because defendant is not a person engaged in an industry affecting commerce within the meaning of Title VII.

SIXTH DEFENSE

Plaintiff's claims under Title VII are barred because plaintiff failed to exhaust her administrative remedies.

SEVENTH DEFENSE

Plaintiff's breach of contract claim is barred by the Statute of Frauds and by a failure of consideration, and is barred because of her status as an employee at will.

EIGHTH DEFENSE

Responding to the specific allegations of plaintiff's complaint:

1.

Defendant admits the allegations of Paragraph 1 of the complaint. For further answer, defendant states, based on information and belief, that plaintiff had, well before her last day of employment with defendant, accepted an offer to practice law with the outstanding firm of Haas, Holland, Lipshutz, Levison & Gibert beginning on or about January 2, 1980.

2.

(a) Answering Paragraph 2(a) of the complaint, defendant admits that it is a general partnership engaged in the practice of law, admits that it has offices in Atlanta,

Georgia and Washington, D. C., and admits that it represents national firms which are engaged in interstate commerce; defendant denies that it is a person engaged in an industry affecting commerce.

(b) Answering Paragraph 2(b) of the complaint, defendant denies that it is an "employer" within the meaning of 42 U. S. C. § 2000(b); defendant admits the remaining allegations of Paragraph 2(b) of the complaint.

(c) Defendant admits Paragraph 2(c) of the complaint; for further answer defendant states that it has never and does not discriminate against women in inviting new members to its partnership.

3.

Answering Paragraph 3 of the complaint, defendant admits that this Court has jurisdiction and venue to consider claims properly brought under Title VII and the Equal Pay Act, as well as pendent jurisdiction; but, under the facts of this case, defendant denies that this Court has jurisdiction and venue over plaintiff's claims under Title VII, or the Equal Pay Act, or for breach of contract.

COUNT ONE

4.

Defendant denies Paragraph 4 of the complaint.

5.

Answering Paragraph 5 of the complaint, defendant admits that portion of Paragraph 5 pertaining to plaintiff's college and law school education; defendant is with-

out knowledge or information sufficient to form a belief as to the truth of the allegation that her academic excellence was recognized throughout her academic career.

6.

Defendant admits plaintiff was admitted to practice before the Supreme Court, Court of Appeals and Superior Courts of Georgia in 1972 and has been a member of the State Bar of Georgia since 1972; and defendant further admits plaintiff was a member of various bar associations and that she served as Chairman of the State Bar Lawyer Referral Committee and that she is a member of the Lawyers Club of Atlanta. Defendant denies the remaining allegations of Paragraph 6.

7.

Answering Paragraph 7 of the complaint, defendant admits that it made an offer of employment to plaintiff; defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation that plaintiff received offers from other law firms.

8.

(a) Defendant admits Paragraph 8(a) of the complaint.

(b) Answering Paragraph 8(b) of the complaint, defendant denies the allegations of Paragraph 8(b) of the complaint as pled. For further answer, defendant states that all associates are employed with the expectation that they will be considered for invitation to partnership on a fair and equal basis within a reasonable

period of time if they meet the firm's standards for partnership.

(c) Defendant admits Paragraph 8(c) of the complaint. For further answer, defendant shows that an associate's evaluations in the early years when he or she is just beginning the practice of law are more limited than in the later years when the firm is in a better position to evaluate the associate's growth toward invitation to partnership.

(d) Defendant denies the allegations contained in Paragraph 8(d) of the complaint, and more specifically denies that an associate is invited to become a partner "as a matter of course" and despite having received only "satisfactory" evaluations.

9.

Answering Paragraph 9 of the complaint, defendant admits that plaintiff accepted an offer of employment and worked for defendant in its real estate department from 1972 through December 31, 1979; defendant denies that it made or that plaintiff had reason to believe all of the representations and assurances alleged in Paragraph 8 of the complaint; defendant further denies that plaintiff was discharged on December 31, 1979, or at any other time, and states that plaintiff was advised in her final evaluation in May 1978 that she would not be invited to become a partner and should seek employment elsewhere. Further answering, defendant states that plaintiff was aware of defendant's practice of not employing permanent associates and knew that associates who had been advised that they would not be invited to become a

partner sshould seek employment elsewhere; defendant specifically offered to assist plaintiff to get employment elsewhere.

10.

Answering Paragraph 10 of the complaint, defendant admits that, during her eight years as an associate with defendant, plaintiff received various communications from clients and partners expressing their appreciation for work she had completed. Answering further, defendant states that during the same time period defendant received criticisms and complaints about plaintiff's performance.

11.

Defendant denies the allegations contained in Paragraph 11 of the complaint. For further answer, defendant states that during her first two years of employment plaintiff received "good", but not "very good" or "outstanding", departmental evaluations. In her third and fourth years (1975 and 1976), plaintiff was advised that she was in a middle category, i. e., that the partnership was "unable to make a decision" as to her prospects for partnership. She was advised during her fourth year evaluation, as in previous evaluations, that she needed to develop a more practical approach to clients' problems. Further answering the allegations of said paragraph, defendant shows that in her fifth year of employment (1977), plaintiff was advised she would "probably not" be invited to become a partner, and in her sixth year (1978) plaintiff was advised defendant had voted *not* to invite plaintiff to become a partner in the firm of King & Spalding.

12.

Defendant denies paragraph 12 of the complaint. For further answer defendant denies that it made assurances to the plaintiff at any time that she would be invited to become a partner; denies that plaintiff was assured at any time that the quality of her work had been judged to be excellent; denies that her failure to be invited to become a partner was unrelated to the deficiency in her performance as a lawyer or personally, and denies that she was assured that she would again be considered for invitation to partnership in May 1979.

For further answer, defendant states that in the plaintiff's fifth year as an associate (1977), the partnership voted and plaintiff was advised that she would "probably not" become a partner. She was further advised of her shortcomings in dealing with clients' business and her inability and unwillingness to develop professional and personal relationships which would make her a full and complete lawyer.

For further answer, defendant states that in the plaintiff's sixth year as an associate (1978), more specifically in May of 1978, the partnership voted that plaintiff would not be invited to become a partner and plaintiff was so advised. At that time and on numerous occasions thereafter, plaintiff was offered assistance in finding other employment by partners in the law firm.

For further answer, in January 1979 plaintiff asked a member of the firm's management committee, Mr. James Sibley, whether the partnership would reconsider its decision. Mr. Sibley agreed to present her request for reconsideration to the partnership, but made it clear to her

that the firm had already made its decision adversely to her and that she had no basis for hope that her request would be granted. The request was put to the partnership which voted not to reconsider the matter.

13.

Defendant denies Paragraph 13 of the complaint. For further answer, defendant states that it voted in May 1979 not to reconsider the final decision it had made in the previous year (1978), to-wit, that plaintiff would not be invited to become a partner. In view of its final decision in 1978, the firm volunteered on several occasions in 1978 and 1979 to assist plaintiff in finding other employment and plaintiff always indicated that she did not wish the firm's assistance.

When plaintiff showed no sign of seeking other employment, defendant, in September 1979, more than one year after the final partnership decision, asked plaintiff when she thought she would be leaving. When she indicated that she would be leaving soon, she was asked whether she would be gone by the end of the year and she stated that that would be more than enough time for her to relocate. Based on these conversations, defendant and plaintiff reached an agreement that plaintiff would leave the firm no later than December 31, 1979. For further answer, because defendant had decided in 1978 that plaintiff would not be invited to become a partner, and was thereafter no longer employed on the same basis as other associates, plaintiff was not given any salary increases or adjustments in 1979.

14.

Defendant denies Paragraph 14 of the complaint.

15.

Defendant denies Paragraph 15 of the complaint, and specifically denies that it follows a custom, practice and policy of not inviting women to become a partner, and denies that its standard for invitation to partnership is higher for women than for men.

16.

Defendant denies Paragraph 16 of the complaint.

17.

Answering Paragraph 17 of plaintiff's complaint, defendant denies the introductory clause that it has discriminated against plaintiff because of her sex.

(a) Defendant denies Paragraph 17(a) of the complaint. For further answer, defendant denies that plaintiff performed all lawful and necessary requirements for being invited to become a partner. Defendant also states that it made its final decision not to invite plaintiff to become a partner in May 1978. In response to plaintiff's request of January 1979, defendant, in May of 1979, voted not to reconsider the 1978 decision.

(b) Defendant denies Paragraph 17(b) of the complaint and states further that it did not give plaintiff a raise or increase, or either, in 1979 because she was no longer an associate who was eligible to become a partner and had indicated that she would be seeking other employment.

(c) Defendant denies Paragraph 17(c) of the complaint. For further answer, defendant denies that it discharged the plaintiff at any time and denies that it coerced

plaintiff to leave the firm or to abandon work for clients in that plaintiff had specifically agreed with defendant that she would leave the firm no later than December 31, 1979. Defendant further denies that it retaliated against plaintiff and shows that such agreement was reached between the plaintiff and defendant prior to plaintiff's filing any action with the EEOC or the present complaint.

Defendant further shows that plaintiff's insistence on performing "work for clients" after having filed her complaint with EEOC raises serious questions of professional ethics and conflict of interest, in view of the fact that these were clients of King & Spalding, not of the plaintiff.

For further answer, defendant states that plaintiff had, at the time of the alleged retaliation and coercion, already agreed to accept employment to practice law with the outstanding firm of Haas, Holland, Lipshutz, Levison and Gibert beginning on or about January 2, 1980.

For further answer, defendant specifically objects to and moves to strike the reference to settlement discussions between plaintiff and defendant and states that said reference is improper and prejudicial and moves that said reference be expunged and physically deleted from the pleadings in this case.

(d) Defendant denies Paragraph 17(d) of the complaint. For further answer, defendant states that it did assign associates to work for plaintiff, despite requests from some associates that they not be required to work with plaintiff, and gave plaintiff responsibility for matters that would require her to work closely with other associates; however, plaintiff demonstrated that she was unable to complete these assignments effectively efficiently, and

in the clients' best interest. Defendant states further that plaintiff demonstrated an inability or unwillingness to develop professional and personal relationships with other associates, partners, and non-legal personnel in the firm, despite being urged to do so by partners of the firm.

(e) Defendant denies Paragraph 17(e) of the complaint, and states that it gave plaintiff assignments that would contribute to her career advancement; however, plaintiff demonstrated that she was unable to complete them effectively, efficiently, and in the best interests of the firm's clients.

(f) Defendant denies Paragraph 17(f) of the complaint, and denies that it failed and refused to evaluate plaintiff's performance in the same manner that it evaluated the performance of male associates. For further answer, defendant states that it used lawful, necessary, and appropriate criteria in evaluating the performance of all associates, male and female. Further, defendant shows that there were male associates in plaintiff's class who were also not invited to become partners in the firm.

(g) Defendant denies Paragraph 17(g) of the complaint.

(h) Defendant denies Paragraph 17(h) of the complaint.

(i) Defendant denies Paragraph 17(i) of the complaint, and specifically denies that it practiced or practices discrimination, denies that there are or were present effects of alleged past and current discrimination practiced by defendant, denies that it has failed to take affirmative action with respect to female lawyers, and denies that its work environment is not as conducive to the

progress of female lawyers toward an invitation to partnership as for male lawyers.

18.

(a) Answering Paragraph 18(a) of the complaint, defendant denies that plaintiff filed a timely charge of discrimination with the EEOC; defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 18(a) of the complaint.

(b) Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 18(b) of the complaint.

(c) Answering Paragraph 18(c) of the complaint, defendant objects to and moves to strike any reference to conciliation efforts by the parties, and states that such references are improper, prejudicial, and defendant moves that such references be expunged and physically deleted from the pleadings in this case.

(d) Defendant denies Paragraph 18(d) of the complaint.

19.

Defendant denies Paragraph 19 of the complaint. For further answer, defendant shows that plaintiff is and has been employed with the outstanding law firm of Haas, Holland, Lipshutz, Levison & Gibert since she left the employ of defendant.

COUNT TWO

20.

Answering Paragraph 20 of the complaint, defendant hereby incorporates by reference its answers to Paragraphs 4 through 19 of plaintiff's complaint as its answer to Paragraph 20 of the complaint.

21.

Defendant denies the allegations contained in Paragraph 21 of the complaint. For further answer, defendant states that plaintiff was advised in May 1978 that she would not become a partner in the firm, was advised to seek employment elsewhere, and was thereafter no longer employed on the same basis as other associates. Male associates in her class who were also not invited to become a partner left the firm and plaintiff was the only remaining associate in her class. When plaintiff evidenced no inclination to seek other employment, it was decided not to give her any further salary increases or adjustments. Regardless, plaintiff was the highest paid associate in the firm in 1979.

22.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 22 of plaintiff's complaint.

COUNT III

23.

Defendant incorporates by reference its answers to Paragraphs 4 through 22 as its answer to Paragraph 23 of the complaint.

24.

Defendant denies the allegations contained in Paragraph 24 of the complaint.

25.

Defendant denies the allegations contained in Paragraph 25 of the complaint.

26.

Defendant denies all allegations contained anywhere in the complaint which have not been admitted, controverted, or denied herein.

NINTH DEFENSE

Defendant is not indebted to plaintiff in any sum or amount.

WHEREFORE, defendant respectfully prays that all prayers for relief by plaintiff be denied, that all other relief be denied plaintiff, that plaintiff's complaint be dismissed with prejudice, and that defendant obtain such other relief as is just and proper.

LOKEY AND BOWDEN
/s/ Hamilton Lokey
/s/ Gerald F. Handley

Attorneys for Defendant
King & Spalding

STATE OF GEORGIA

COUNTY OF FULTON

Personally appeared before me, the undersigned attesting officer, duly authorized to administer oaths R. BYRON ATTRIDGE, who, having been duly sworn, says on oath, that the facts set forth in the within and foregoing Answer are true and correct to the best of his knowledge and belief.

/s/ R. Byron Attridge

KING & SPALDING'S MOTIONS TO DISMISS PLAINTIFF'S COMPLAINT

NOW COMES KING & SPALDING, a partnership named as defendant in this action, and, pursuant to Rule 12 of the Federal Rules of Civil Procedure, moves this Court to dismiss plaintiff's complaint and enter judgment in its behalf, as follows:

1.

King & Spalding moves to dismiss Count I of plaintiff's Complaint, which alleges a violation of Title VII of the Civil Rights Act of 1964, on the ground that this Court lacks jurisdiction over the subject matter in that plaintiff failed to file a Charge of Discrimination with the EEOC within 180 days of the date of the alleged act of discrimination in not inviting plaintiff to become a partner of King & Spalding, said act having occurred on May 26, 1978, a period of time 542 days prior to the plaintiff's filing a Charge of Discrimination with the EEOC.

2.

King & Spalding moves to dismiss Count I of plaintiff's Complaint, which alleges a violation of Title VII of the Civil Rights Act of 1964, on the ground that this Court lacks jurisdiction over the subject matter in that plaintiff's Complaint in Count I is that the King & Spalding partners failed to offer a partnership to plaintiff because she is a woman, thereby discriminating against her as an employee. Because the relationship among members of a law partnership is not that of employer-employee, there is no statutory basis for plaintiff's claim that Title VII was violated when the King & Spalding partners failed to "promote" plaintiff to partnership.

3.

King & Spalding moves to dismiss Count II of plaintiff's Complaint, which alleges a violation of the provisions of the Equal Pay Act amendments to the Fair Labor Standards Act, 29 USC, Sec. 206(d) (1) upon the ground that said Count II fails to state a claim against this defendant upon which relief can be granted, in that during the entire period in question plaintiff's pay was equal to or greater than that of any other associate of the King & Spalding firm.

4.

King & Spalding moves to dismiss Count III of plaintiff's Complaint, which alleges a breach of contract, upon the ground that said Count III fails to state a claim against this defendant upon which relief can be granted,

in that plaintiff was employed under an oral contract, terminable at the will of either party.

In support of its motions to dismiss King & Spalding attaches the affidavit of James M. Sibley as Exhibit A, the affidavit of Richard A. Denny, Jr., as Exhibit B, and the affidavit of Denise Hatter as Exhibit C.

WHEREFORE, defendant King & Spalding moves that plaintiff's Complaint be dismissed with prejudice, that judgment be entered in its behalf, that costs be taxed against plaintiff, and that it receive such further relief as the Court deems proper.

Respectfully submitted,

Lokey and Bowden

By: /s/ Hamilton Lokey
/s/ Gerald F. Handley

Attorneys for Defendant
King & Spalding

EXHIBIT A

AFFIDAVIT OF JAMES M. SIBLEY

STATE OF GEORGIA

COUNTY OF FULTON

Personally before me, the undersigned officer duly authorized to administer oaths, appeared JAMES M. SIBLEY, who after being duly sworn, stated on oath of his personal knowledge as follows:

1.

My name is James M. Sibley. I am a partner in the law firm of King & Spalding. I have personal knowledge of the facts stated in this Affidavit. I am under no legal disability. This Affidavit is given for use in the above-styled action and specifically in support of King & Spalding's Motion to Dismiss plaintiff's Complaint.

2.

I have been a partner in King & Spalding since 1947. I have served as Chairman of the Management Committee of the partnership on several occasions, and was Chairman of the Management Committee throughout 1978 and 1979. I was also the Lawyer Administrative Partner for the firm in 1978 and 1979. As Lawyer Administrative Partner, I was charged with general supervision of the performance and work assignments of attorneys in the firm as well as with general responsibility for the relationships between attorneys in the firm. As such, I was also involved in the firm's evaluation of associates.

3.

At King & Spalding, lawyers are considered for invitation to partnership through various ways or courses of action. Some lawyers, after practicing with other partnerships or associations, by virtue of their experience and achievements at the bar, have been invited to the partnership directly; other lawyers with somewhat less experience are invited to partnership after spending a short period as an associate in the firm before being considered for partnership; most of the lawyers considered for partnership are considered after having joined the firm following law school or judicial clerkships and after working at the firm as an associate for a number of years. However, they are considered for partnership, the lawyer under consideration is evaluated by the partnership's inquiry into various areas, including, but not limited to, the lawyer's technical skill, leadership, ability to attract and handle a client's work in an outstanding manner, ability to deal with other lawyers both within and without the firm, and a general compatibility with the lawyers in the partnership.

4.

For a number of years, King & Spalding has evaluated all associates on an annual basis. This evaluation is designed both to aid an associate in assessing his or her strengths and weaknesses as an attorney and, in the later years, to advise an associate of his or her likelihood of being invited to become a partner in the associate's sixth year of practice. The evaluation process includes detailed inquiry into a number of areas, including the associate's technical skills, leadership ability, and ability

to deal with other lawyers, clients, and employees of the firm.

5.

At the end of the fourth and fifth years, the partnership, after reviewing the evaluations, votes on whether an associate is likely or unlikely to become a partner; in some instances, the evaluations are inconclusive and the partnership simply defers the decision. Implicit in an evaluation at the fourth or fifth year that an associate is likely to become partner is the assumption that the associate will continue to develop and broaden his or her skills and abilities.

6.

Ms. Hishon was evaluated as an associate as part of the program described above. I am personally familiar with the evaluation of Ms. Hishon which was done at the conclusion of her fourth (1976) and fifth (1977) years as an associate, as well as the evaluation at the end of her sixth year (1978) when the decision not to admit her to the partnership was made.

7.

At the end of her fourth year (1976), Ms. Hishon's evaluation reflected certain concerns as to her relationships with clients and other people within the firm. It was too early to project, however, whether these concerns would be resolved as Ms. Hishon gained experience. As a result of these concerns, Ms. Hishon's evaluation was inconclusive and the partnership voted that it could not

accurately at that time determine her chances of becoming a partner.

8.

The evaluation at the end of Ms. Hishon's fifth year (1977) indicated that the concerns identified in the preceding year had not been resolved, and had indeed become problems, and that she was not developing and progressing with her peers. It was determined that Ms. Hishon was having some difficulties in dealing with other attorneys and with clients. After carefully reviewing and discussing these difficulties, the partnership determined that Ms. Hishon would "probably not" be invited to become a partner in the firm, and Ms. Hishon was advised of this determination in September 1977. "Probably not" is a specific evaluation category (a term of art within the firm evaluation process) which is considered and voted on by the partnership. At the same time, those associates who received favorable evaluations and who the following year were invited into the partnership, were informed that they would "probably" be invited to the partnership, if they continued to grow in accordance with the expectations of the partners.

9.

In May 1978, at the end of Ms. Hishon's sixth year as an associate, she was again evaluated by the partnership, this time in the context of the final partnership decision. The problems identified earlier still persisted and there was substantial doubt that Ms. Hishon could perform effectively the requirements of a partner in the firm. It was strongly felt that these problems would preclude Ms.

Hishon from being an effective partner in the firm. Accordingly, the partnership determined that Ms. Hishon would not be invited to become a partner in the firm. Ms. Hishon was immediately advised of this decision.

10.

It is the custom and practice of the firm for an associate who is not invited into the partnership to remain at the firm until he or she has had an opportunity to obtain other employment. Accordingly, the firm directed Mr. Denny to so advise Ms. Hishon that she was welcome to remain with the firm for a reasonable time while pursuing career opportunities elsewhere.

11.

In Ms. Hishon's associate class of seven lawyers, four associates were invited to join the partnership; three associates, Ms. Hishon and two male attorneys, were *not* invited to join the partnership. These two male attorneys had, consistent with the firm's custom and practice, left the firm in 1977 to practice elsewhere.

12.

In January 1979, Ms. Hishon requested a meeting with me. I met with her and Mr. Richard A. Denny, Jr., the Administrative Partner of the Real Estate Department. At that meeting, Ms. Hishon inquired into her "status" with the firm. Mr. Denny and I informed her that the partnership considered its determination in May 1978 (some eight months before) with regard to her invitation to partnership to be final. Ms. Hishon then asked me whether the partnership would reconsider its decision not

to make her a partner. I personally had no desire to have her reconsidered because I did not think she merited it. Nonetheless, I agreed to present her request for reconsideration to the partnership. I made it clear to her that the firm had already made its decision adversely to her and that she had no basis for optimism that her request would be granted. Neither at this meeting, nor at any other time prior to her attorney's contact in November 1979 did Ms. Hishon aver or mention that she felt she had been discriminated against due to her sex.

13.

At a partnership meeting in May 1979, I conveyed Ms. Hishon's request to be reconsidered to the partners. The partners voted not to reconsider the final decision they had made in the previous year not to make Ms Hishon a partner.

14.

I understand that Ms. Hishon is asserting a claim under the Equal Pay Act. I am personally familiar with the compensation policy which King & Spalding has had in effect for associates during the period of Ms. Hishon's employment with the firm. Stated simply, the firm has followed a policy whereby all associates in a given class receive the same gross compensation from the firm. The only differences in compensation are based upon the associate's tenure with the firm or, where appropriate, upon an associate's prior experience, such as a judicial clerkship or employment with another law firm. The firm does not provide merit bonuses or any other differentiating compensation to members of a given class of associates. Pursuant

to this policy, Ms. Hishon received the same gross compensation as the other members of her class during the period from 1972 through June 1978. Beginning in July 1978, Ms. Hishon was the only associate attorney remaining in that class (four had become partners; two others who were not invited to become partners had left the firm.)

15.

Associate attorneys are employed by King & Spalding for an indefinite term. The firm understands that an associate is free to leave the firm at any time and seek other employment. Similarly, the firm retains the right to discharge any associate who, for any reason, does not meet the firm's standards. No written employment contract has ever been entered into between King & Spalding and any associate attorney, including Ms. Hishon.

/s/ James M. Sibley

EXHIBIT B

AFFIDAVIT OF RICHARD A. DENNY, JR.

STATE OF GEORGIA

COUNTY OF FULTON

Personally before me, the undersigned officer duly authorized to administer oaths, appeared RICHARD A. DENNY, JR., who, having been duly sworn, stated on oath of his personal knowledge as follows:

1.

My name is Richard A. Denny, Jr. and I am a partner in the law firm of King & Spalding. I have personal knowledge of the facts set forth in this Affidavit. I am under no legal disability. This Affidavit is given for use in the above-styled action and specifically in support of King & Spalding's Motion To Dismiss Plaintiff's Complaint.

2.

I presently serve as the Administrative Partner of the Real Estate Department at King & Spalding. I have been Administrative Partner since the Real Estate Department was formed in 1968.

3.

As Administrative Partner of the Real Estate Department, I have general supervisory responsibility for the associates who are assigned to the Department. This responsibility includes overseeing work assignments, supervising client's relationships, and generally reviewing each associate's development. Throughout the period of her

employment with King & Spalding, plaintiff Elizabeth A. Hishon was assigned to the Real Estate Department.

4.

As Administrative Partner of the Real Estate Department, I also have a principal responsibility for the evaluation of associates in the Department. I have reviewed the Affidavit of Mr. James M. Sibley dated March 28, 1980 and I confirm as accurate the account in that Affidavit of the evaluations of Ms. Hishon that were made after her fourth and fifth years as an associate. I further confirm as accurate Mr. Sibley's account of the final partnership determination which was made after Ms. Hishon's sixth year as an associate.

5.

I had personal responsibility for communicating the results of her evaluations to Ms. Hishon, and I informed her of each result and the reasons for each result, as those reasons are set forth in Mr. Sibley's Affidavit.

6.

In addition, at the end of her fourth year, Ms. Hishon was told by me that she was making progress, but that additional progress would have to be made for her to be considered for partner. At the end of her fifth year (1977), Ms. Hishon was clearly told by Mr. Sibley and me that she would "probably not" be invited to become a partner.

7.

I also informed Ms. Hishon of the partnership's decision in May 1978 that she would not be made a partner,

and explained the grounds for that decision. She expressed great disappointment with the decision, but she did not ask whether that decision would be reconsidered at any future meeting.

8.

After I informed Ms. Hishon of the partnership decision in May 1978, she and I discussed her future plans. Ms. Hishon indicated that she did not wish to remain with the firm if she was not to become a partner. I advised her that the firm would assist her in finding another job which is consistent with firm custom and practice for associates who are not invited to become partners. In December 1978, Ms. Hishon and I again discussed her future plans, and I reiterated the firm's interest in helping her find other employment.

9.

In January 1979, Ms. Hishon asked to arrange a meeting with Mr. Sibley. I arranged and attended the meeting. Ms. Hishon's inquiry at that meeting into her "status" with the firm was totally surprising to me since, in our earlier conversations, Ms. Hishon had expressed her understanding that the firm expected her to leave and was willing to help her find other employment. Ms. Hishon then asked whether the firm would reconsider its May 1978 decision. That was, to my knowledge, the first time that Ms. Hishon had inquired into the possibility of the firm reconsidering its decision. Mr. Sibley indicated that he would convey Ms. Hishon's request for reconsideration to the partnership but that she should not be optimistic that it would be granted. Ms. Hishon did not state or suggest in any

way that the 1978 decision must or should be reconsidered because the firm had allegedly discriminated against her due to her sex. The first time that I knew that she felt that she had allegedly been discriminated against due to her sex was when the firm was contacted by her lawyer in November 1979.

10.

In May 1979 the partnership voted not to reconsider its determination not to admit Ms. Hishon as a partner. I conveyed this decision to her immediately and again encouraged her to find other employment. Her response was that she had been working on finding another job.

11.

In September 1979, I told Ms. Hishon that the firm needed to have a clear idea of when she planned to leave. When she responded that she was making plans and should be gone soon, I asked whether it was reasonable to assume that she would be gone by December 31, 1979. She responded that it was reasonable and that she probably would be gone sooner.

12.

Ms. Hishon left the firm effective December 31, 1979. It is my understanding and belief that, on January 2, 1980, Ms. Hishon was employed by the firm of Haas, Holland, Lipshutz, Levison and Gibert.

/s/ Richard A. Denny, Jr.

EXHIBIT C

AFFIDAVIT OF DENISE HATTER

Personally before me, the undersigned officer duly authorized by law to administer oaths, appeared DENISE HATTER, who, having first been duly sworn, stated on oath as follows:

1.

My name is Denise Hatter. I have personal knowledge of the facts set forth in this Affidavit. I am under no legal disability. This Affidavit is given for use in the above styled action and specifically in support of King & Spalding's Motion To Dismiss plaintiff's Complaint.

2.

I am employed by King & Spalding as Head of the firm's Accounting and Bookkeeping Department. I am in charge of the business records which King & Spalding maintains in the ordinary course of its business and which reflect the total compensation paid to associate attorneys employed by the firm.

3.

The business records maintained by King & Spalding reflect that at all times from July 1, 1978 through December 31, 1979 plaintiff Elizabeth Anderson Hishon was paid a higher salary than any other associate employed by the firm. Ms. Hishon's base salary throughout this period exceeded that paid to the next highest paid associate employed by the firm by $1,500. In addition, Ms. Hishon received a year-end bonus from the firm in both 1978 and 1979 that equalled the highest bonus paid by the firm to any other associate. Such a bonus is not a merit bonus,

but a routine year-end bonus paid on the basis of longevity of service. In summary, Ms. Hishon's total compensation from the firm during this period exceeded the highest compensation paid by King & Spalding to any other associate.

/s/ Denise Hatter

KING & SPALDING'S BRIEF IN SUPPORT OF ITS MOTIONS TO DISMISS PLAINTIFF'S COMPLAINT

NOW COMES KING & SPALDING, a partnership named as defendant in this action, and respectfully submits this Brief in Support of its Motions to Dismiss Plaintiff Elizabeth Anderson Hishon's ("plaintiff") Complaint.

STATEMENT OF FACTS

Plaintiff's complaint, in essence, is that she was not invited to become a partner in King & Spalding because she was a woman. The decision of the partners of King & Spalding not to invite the plaintiff to become a partner was made on May 26, 1978. Plaintiff filed her first complaint charging sex discrimination with the EEOC on November 19, 1979, a date 542 days after the final decision was made. Section 706(d) of Title VII of the 1964 Civil Rights Act provides a 180 day Statute of Limitations for filing a Charge of Discrimination with the EEOC.

King & Spalding's decision not to invite the plaintiff into partnership was based on merit and the fact plaintiff is a woman played no part in the decision, but even if it had, that decision cannot be challenged now.

Plaintiff contends the decision not to invite her to partnership was made by the King & Spalding partners on May 25, 1979. This is simply no so. The facts are that, on January 15, 1979, 234 days after the final decision not to invite plaintiff to partnership had taken place, plaintiff for the first time asked if the partners would reconsider their decision of May 26, 1978. On May 25, 1979, the plaintiff's request for reconsideration was presented to the partners. At that meeting the partnership voted that the previous year's final decision would not be reconsidered.

Defendant King & Spalding is a partnership organized under the laws of the State of Georgia and engaged in the general practice of law. The firm presently consists of 103 lawyers, including 52 partners and 51 associates.

Plaintiff was employed as an associate by King & Spalding from April 3, 1972 through December 31, 1979.

During the period of plaintiff's employment with King & Spalding, the firm followed certain established procedures regarding the evaluation of associates and the method of determining whether an associate would be invited to become a member of the partnership. Those procedures and the application of the procedures to plaintiff are explained in the Affidavits of James M. Sibley (Exhibit "A") and Richard A. Denny, Jr. (Exhibit "B"), partners in the firm. **An understanding of the firm's procedures clearly establishes that this Court lacks subject matter jurisdiction over Count I of plaintiff's Complaint and that Counts II and III fail to state a claim upon which relief can be granted.**

King & Spalding periodically evaluates the professional development of each associate in order to determine

what progress he or she is making toward invitation to partnership. Pursuant to this established evaluation plan, plaintiff received evaluations of her performance and professional development at the end of her fourth and fifth years as an associate. At the end of her fourth year as an associate (1976), plaintiff's evaluation reflected certain concerns about her relationships with clients and people within the firm. As a result, plaintiff's evaluation was inconclusive and the partnership determined that it could not accurately predict her chances of becoming a partner. Plaintiff was advised by Mr. Denny, the Administrative Partner of the Real Estate Department, that her evaluation indicated that she was making progress, but that additional progress would have to be made for her to be considered for partner. Thus, no assurances were given to her at that time that she would become a partner. At or about the end of plaintiff's fifth year as an associate (1977), she was advised by Mr. Denny that, based upon her overall performance as an associate, she "probably would not" be invited to become a partner in the firm.

The partnership's final determination with regard to plaintiff and plaintiff's class of associates was made in May, 1978. It was determined at that time plaintiff would not be invited into the partnership. Plaintiff was advised of this decision by Mr. Richard A. Denny, Jr.

After this decision was made, Mr. Denny was requested to advise plaintiff that consistent with the custom and practice of King & Spalding she was welcome to remain with the firm, but only until she had had a reasonable time to pursue other career opportunities. He so advised plaintiff shortly thereafter.

In plaintiff's class there were seven associates. Four were invited to partnership. Three were not—the plaintiff and two male associates.

At the time that she was advised of the determination not to admit her to the partnership, there was no discussion as to whether the firm would reconsider its decision. To the contrary, the decision was conveyed to plaintiff as being the final determination with regard to her admission into the partnership.

In January, 1979, eight months after the final partnership determination regarding plaintiff, she requested a meeting with Mr. Denny and James M. Sibley, a partner in the firm who was, at that time, Chairman of the Management Committee. At that meeting, plaintiff first inquired into her "status" with the firm. Mr. Sibley told plaintiff that the partnership determination in May, 1978, had been the final decision on that question. Plaintiff then asked whether the partnership would reconsider its decision not to make her a partner. Mr. Sibley agreed to present plaintiff's request for reconsideration to the partnership, but stated unequivocally to plaintiff that, in his opinion, the firm had already made its final partnership decision with regard to her and that she had no basis for optimism that her request for reconsideration would be granted.

At a meeting of the partnership in May, 1979, Mr. Sibley conveyed to the partnership plaintiff's request for reconsideration of the 1978 decision, but the partnership determined not to reconsider the 1978 decision. This information was immediately conveyed to plaintiff by Mr. Denny, and plaintiff was again urged to seek other employment.

The facts set forth above demonstrate that *the only partnership determination which was ever made with regard to plaintiff was made in May, 1978.* Plaintiff's allegations regarding the compensation policies of the firm and her departure from the firm in 1979 merely describe subsidiary effects of that decision. King & Spalding does not employ permanent associates, and associates who are not admitted to partnership are expected, after a reasonable period of time, to find other employment. The firm offers all reasonable assistance to such associates in finding employment. The facts set forth in Mr. Denny's Affidavit establish that plaintiff received the full benefit of the firm's policies regarding associates who are not invited into the partnership.

The facts also provide a clear basis for dismissal of Count II of plaintiff's Complaint, her claim under The Equal Pay Act. Throughout the tenure of plaintiff's employment with the firm, King & Spalding followed a policy of compensating all members of a given class of associates on an equal or "lock-step" basis. For compensation purposes, an associates's "class" is generally determined by the year in which he or she joins the firm. At all times between the time plaintiff was hired as an associate in 1972, and the decision of the firm not to admit her into the partnership in 1978, plaintiff was compensated on completely equal terms with her contemporaries in the firm. There were two other associates in plaintiff's class (both males) who also were not invited to become partner; both left the firm in 1977 after their fifth year evaluations. Although plaintiff received a negative appraisal in 1977, she remained with the firm and was compensated on an equal basis with the four other members of her class who

remained. Following the admission of these four persons to the partnership in July, 1978, plaintiff was the only employee in her class remaining with the firm. Thereafter, until her departure on December 31, 1979, she remained the highest paid associate in the firm.

Finally, the facts demonstrate that Count III of plaintiff's Complaint should be dismissed. No written contract of employment ever existed between plaintiff and defendant. At all times, plaintiff was an employee at will, and it was understood by all parties that plaintiff could resign or be discharged at any time. Under these facts, there could be no executory obligation on King & Spalding to admit plaintiff to the partnership.

ARGUMENT AND CITATION OF AUTHORITIES

THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER PLAINTIFF'S CLAIM UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964.

A. Plaintiff's Failure To File A Charge Of Discrimination Within 180 Days Of The May, 1978 Partnership Decision Deprives This Court Of Jurisdiction Over County I.

Section 706(d) of Title VII of the 1964 Civil Rights Act, as amended, provides that a party alleging discrimination in violation of the Act must file a Charge of Discrimination with the EEOC "within 180-days after the alleged unlawful employment practice occurred . . . " 42 U. S. C. § 2000e-5(e). Under the controlling decisions of the Fifth Circuit, it is clear that timely compliance with this filing requirement is a jurisdictional prerequisite to the maintenance of an action under Title VII. ***Gonzalez***

v. Firestone Tire & Rubber Co., 610 F. 2d 241 (5th Cir. 1980); *Bickham v. Miller*, 584 F. 2d 736, 738 (5th Cir. 1978); *McArthur v. Southern Airways, Inc.*, 569 F. 2d 276, 277 (5th Cir. 1978) (where "no plaintiff in this cause made a timely filing with the Equal Employment Opportunity Commission (EEOC), the District Court should have dismissed this cause for lack of jurisdiction"); *see United Air Lines, Inc. v. Evans*, 431 U. S. 553, 555 and n. 4; see also *Canty v. Olivarez*, 452 F. Supp. 762, 767 (N. D. Ga. 1978). Defendant respectfully submits that, in this case, the only alleged discriminatory event about which plaintiff could legally complain was the decision in May, 1978 not to invite her to become a partner. Because plaintiff alleges that she filed her Charge of Discrimination with the EEOC on November 19, 1979, more than one and one-half years after the firm's decision, this Court lacks subject matter jurisdiction over her Title VII claim.

The essence of plaintiff's Title VII claim is that she was discriminatorily denied admission to the partnership of King & Spalding. While the Complaint outlines other allegedly discriminatory conduct, these other matters constitute no more than inevitable effects of the partnership decision and are not independently actionable, as explained below. With regard to the partnership claim itself, the Affidavits of James M. Sibley and Richard A. Denny, Jr., Exhibits "A" and "B" to Defendant's Motion To Dismiss, provide the factual basis of defendant's argument that this Court lacks subject matter jurisdiction over plaintiff's claim. Specifically, those Affidavits establish the following facts:

(1) Consistent with firm policy and practice, plaintiff was considered for partnership on only one occasion, and that occasion was in May, 1978.

(2) The year before, she had been warned in her evaluation that she would probably not be invited to become a partner.

(3) Following the decision not to admit plaintiff into the partnership in May, 1978, plaintiff was advised of the firm's decision and encouraged to seek other employment.

(4) In January, 1979, eight months after the final partnership decision, plaintiff for the first time requested that the firm reconsider its May, 1978 decision not to admit her to the partnership. Plaintiff was advised her request would be conveyed to the partnership but she should not be optimistic about the prospects for reconsideration.

(5) In May, 1979, the partnership determined not to reconsider its 1978 decision that plaintiff would not be invited to become a partner.

(6) The firm has never reconsidered or reversed a final decision on whether to admit an associate to the partnership.

In evaluating the facts alleged in plaintiff's Complaint, in light of the affidavits submitted by Defendant, it should be remembered that Defendant's Motion To Dismiss Count I is based upon this Court's lack of subject matter jurisdiction, not upon the failure of the Complaint to state a claim. It is, of course, well established that "[t]he burden of proof on a Rule 12(b)(1) motion [to dismiss for lack of subject matter jurisdiction] is on the party asserting jurisdiction." 5 *Wright & Miller, Federal Practice & Procedure: Civil* § 1350, at 555; *Thomson v. Gaskill*, 315 U.S. 442 (1942); *McNutt v. General*

Motors Acceptance Corp., 298 U. S. 178 (1936); *Save Our Cemeteries, Inc. v. Archdiocese*, 568 F. 2d 1074, 1076 (5th Cir. 1978) rehearing denied, 572 F. 2d 320, cert. den., 439 U. S. 836 (1978); *Canty v. Olivarez*, 452 F. Supp. 762 (N. D. Ga. 1978) (burden on plaintiff in Title VII case to establish jurisdiction by proving that complaint was filed in timely manner). Plaintiff's Complaint indicates that her Charge of Discrimination was not filed with the EEOC until November 19, 1979 (Complaint ¶ 18(a)). Thus, because the only partnership decision regarding plaintiff was made in May, 1978, her Charge was untimely and this Court lacks jurisdiction.

It is apparent from plaintiff's Complaint that she hopes to establish the jurisdiction of this Court by reference to the May, 1979 partners' meeting. The Affidavits of James M. Sibley and Richard A. Denny, Jr. establish conclusively, however, that plaintiff was not in any sense considered for partnership at that meeting. To the contrary, the partnership voted *not* to reconsider its May, 1978 decision that plaintiff would not be invited into the partnership. No presumptive truthfulness attaches to plaintiff's allegations that an actual determination was made not to admit her in 1979, since these allegations relate to the jurisdictional basis of her claim. See *Mortensen v. First Federal Savings & Loan Association*, 549 F. 2d 884, 891 n. 16 (3rd Cir. 1977). Moreover, plaintiff has alleged no facts which would show that the firm's determination not to reconsider its May, 1978 decision was discriminatory. The affidavits show to the contrary that plaintiff is the first associate to have ever requested a reconsideration.

Because she was considered for partnership only in May, 1978, plaintiff was required to file her Charge of Discrimination within 180-days after she was informed of the May, 1978 decision. See *Bickham v. Miller,* 584 F. 2d 736 (5th Cir. 1978) (Air Force employee's claim of sex discrimination and promotion barred by failure to file charge within prescribed time of learning that application for promotion was denied). There is no question but that plaintiff was advised shortly after the May, 1978 partners' meeting that she would not be invited into the partnership, and the time for the filing of her Charge of Discrimination accordingly began to run from the date of that advice. The mere fact plaintiff chose, eight months after the partnership decided not to admit her, to seek a reconsideration of this decision, can in no sense revive her claim of discrimination. See *Goldman v. Sears, Roebuck & Co.*, 607 F. 2d 1014 (1st Cir. 1979).

In *Goldman* the First Circuit explained that a request to reconsider an earlier employment decision could not revive a cause of action which was otherwise time-barred. The plaintiff in *Goldman* was transferred from one department to another, less profitable department. The Complaint alleged the plaintiff made "repeated requests" to be returned to his original department, but the defendant refused. The First Circuit held the plaintiff's claim was barred by his failure to file a Charge of Discrimination within 180-days of the original transfer, and offered the following explanation as to why a request for reconsideration of the transfer was not sufficient to revive the claim.

> "Under the construction urged by appellant, every demotion could be turned into a continuing violation merely by pleading that plaintiff had continued to pro-

> test unsuccessfully. We are not persuaded that Congress intended such an easy means of circumventing the 180-day requirement.
>
> 607 F. 2d at 1019.

See also: *Gonzales v. Firestone Tire & Rubber Co.*, 610 F. 2d 241, 249 (5th Cir. 1980) (allegations that an employer "refused to rectify its past violation" will not revive an otherwise time-barred claim); *Woodburn v. LTV Areospace Corp.*, 531 F. 2d 750 (5th Cir. 1976); *Brohl v. Singer Co.*, 407 F. Supp. 936, 939 (M. D. Fla. 1976) (discharged employee who failed to file a notice of intent to sue within time prescribed under Age Discrimination in Employment Act could not revive claim simply by seeking reemployment).

It would be particularly inappropriate to allow plaintiff in this case to revive her claim because her request for reconsideration was not made until January 1979, eight months after the final decision had been made in May, 1978. Thus, the time within which plaintiff could lawfully file a Charge of Discrimination with regard to the partnership determination had already expired before she even requested reconsideration. Under these facts, to allow plaintiff to revive a dead cause of action merely by requesting reconsideration would be tantamount to reading the 180-day filing requirement out of the statute. Any claimant could revive a stale claim simply by reapplying or requesting reconsideration. Such an interpretation would directly undercut the legislative intent of quickly resolving employment disputes of this kind.

Since the Court lacks subject matter jurisdiction over the question of whether plaintiff was discriminatorily denied admission to the partnership, the Court also lacks

jurisdiction to consider the other allegations included in Count I of plaintiff's Complaint, because these allegations relate solely to the inevitable *effects* of the partnership determination. Under the established policies of Defendant, there are no permanent associates. If an attorney is not admitted to the partnership, that attorney is expected, within a reasonable period of time, to find other employment. Placed within this context, plaintiff's allegations regarding defendant's failure to grant her salary increases and the decision to encourage her to find other employment merely describe *effects* of the decision not to admit her to the partnership. The simple fact that a decision has continuing effects is not sufficient for Title VII jurisdiction when the decision itself has not been made the subject of a timely charge with the EEOC.

In *United Air Lines, Inc. v. Evans,* 431 U. S. 553 (1977), the Supreme Court carefully delineated the difference between a discriminatory act or decision, which can properly form the basis for a claim under Title VII, and the continuing effects of such a decision, which cannot provide the independent basis for a claim. In *Evans,* the plaintiff had been forced to resign her employment as a flight attendant in 1968 because she became a married woman. Subsequently, the company changed its policy to allow married employees to serve as flight attendants, and the plaintiff was hired as a new employee. After several attempts to regain her seniority for the time which she had previously worked, the plaintiff brought suit, alleging the discriminatory effects of her forced resignation in 1968 were being illegally perpetuated by United's refusal to grant her seniority for her previous employment. The Supreme Court held the failure of the plaintiff to file a Charge of Discrimination within 180-days of her forced

resignation in 1968 barred her claim, even though the decision continued to affect her job. As Justice Stevens explained:

> "Respondent is correct in pointing out that the seniority system gives present effect to a past act of discrimination. But United was entitled to treat that past act as lawful after respondent failed to file a charge of discrimination within the 90-days then allowed by section 706(d). A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences."
>
> *United Air Lines, Inc. v. Evans*, 431 U. S. 553 at 558.

The Fifth Circuit recently analyzed the *United Air Lines* decision and explained that "[a]lthough . . . a past discriminatory act may continue to affect an employee's present pay and fringe benefits, such an effect does not constitute a continuing violation of Title VII." *Gonzalez v. Firestone Tire & Rubber Co.*, 610 F. 2d 241, 249 (5th Cir. 1980). Rather, the *Gonzales* Court explained, the decision which generated the effects must itself have been the subject of a timely charge:

> "[W]here the employer engaged in a discrete act of discrimination more than 180 days prior to the filing of a charge with the EEOC by the employee *allegations that the discriminatory act continues to adversely affect the employee or that the employer presently refuses to rectify its past violation will not satisfy the requirement of 42 U. S. C. § 2000e-5(e)*

that the plaintiff file his charge of discrimination within 180 days of the discriminatory act."

610 F. 2d at 249.
(Emphasis added.)

Applying the *Evans* and *Gonzales* analysis to this case, the only arguable violation of Title VII was the May, 1978 partnership decision. If plaintiff's claim with regard to that decision is barred, she has no independent right to complain about the continuing effects of that decision under the established policies and procedures of defendant.

In summary, this Court lacks subject matter jurisdiction over plaintiff's claim that she was discriminatorily denied access to the partnership because plaintiff failed to file a Charge of Discrimination complaining of that decision within 180-days after the May, 1978 partnership meeting. Since the remaining allegations of Count I of plaintiff's Complaint deal with subsidiary *effects* of the partnership decision, this Court similarly lacks jurisdiction to consider those claims.

B. Admission To Partnership Is Not A Term or Condition Of Employment Within The Meaning Of Title VII And The Court Therefore Lacks Jurisdiction Over Count I Of Plaintiff's Complaint.

As indicated above, the essence of plaintiff's Title VII claim is that she was unlawfully denied admission into the partnership on the basis of her sex. On the basis of statutory, common law, and constitutional considerations outlined below, defendant respectfully submits the standards used to govern an invitation to partnership in a law firm are not subject to scrutiny under Title VII, and this

Court therefore lacks jurisdiction to consider plaintiff's partnership claim.

Sections 703(a) and (b) of Title VII provide that it is unlawful:

> "(a) To fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his *compensation, terms, conditions, or privileges of employment,* because of such individual's race, color, religion, sex, or national origin, or
>
> (b) To limit, segregate, or classify his *employees or applicants for employment* in any way which would deprive or tend to *deprive any individual of employment opportunities or otherwise adversely affect his status as an employee,* because of such individual's race, color, religion, sex or national origin."
>
> 42 U. S. C. § 2000e-2(a) and (b) (Emphasis added)

Defendant submits that admission to the partnership is an invitation to become a principal or owner of the law firm. As such, the standard applied to partnership determinations is not a term or condition of employment within the meaning of Title VII and does not affect an associate's status as an employee.

In *Burke v. Friedman,* 556 F. 2d 867 (7th Cir. 1977), the Seventh Circuit specifically held that the individual partners in an accounting firm could not be considered employees within the meaning of Title VII. As the Court explained, at page 869:

> "'A partnership is generally said to be created when persons join together their money, goods, labor, or skill for the purpose of carrying on a trade, profession, or business and when there is community of in-

terest in the profits and losses.' *Commissioner of Internal Revenue v. Tower*, 327 U. S. 280, 286, 66 S. Ct. 532, 535, 90 L. Ed. 670 (1946). . . . Similarly, Section 6 of the Uniform Partnership Act defines a partnership as 'an association of two or more persons to carry on as co-owners a business for profit.' Partners manage and control the business and share in the profits and losses. . . . In light of the foregoing, we do not see how partners can be regarded as employees rather than as employers who own and manage the operation of the business."

In addition to the authorities discussed above, defendant submits the nature of the partnership relationship precludes the application of Title VII. Partnerships are unique legal entities governed by state law. By statute in Georgia, no person can become a member of a partnership without the consent of the existing partners. Ga. Code Ann. § 75-204. This rule accords with the common law's recognition that consent is the very essence of partnership. As the Georgia Supreme Court has recognized:

> "[T]he partnership consists of a few individuals, bound together by ties of friendship and mutual confidence, and who therefore are not at liberty, without the consent of all, to retire from the firm and substitute other persons in their places."
>
> *Hammond v. Otwell*, 170 Ga. 832, 833 (1930).

To hold Title VII governs the standards of admission to a business partnership like King & Spalding would be to require the existing partners to enter into a partnership with plaintiff against their will, thereby ignoring the consensual nature of a partnership. Defendant submits nothing in the statutory language or legislative history of Title VII indicates that Congress intended to rewrite the partnership laws of the States to eliminate this essential consent requirement. Absent such an implicit rewriting,

however, the Act cannot be applied to admission to a partnership.

In addition to the statutory and common law principles which suggest that Title VII does not apply to the standards by which partners are admitted to a partnership, there are strong constitutional barriers as well.

A business partnership is certainly one type of association which is protected by the First Amendment from excessive governmental intrusion. Justice Goldberg explained in 1964, the year Title VII was enacted:

> "[I]t is the constitutional right of every person to close his home or club to any person or to choose his social intimates and *business partners* solely on the basis of personal prejudices including race. These and other rights pertaining to privacy and private association are themselves constitutionally protected liberties."
>
> *Bell v. Maryland*, 378 U. S. 226, 313 (1964) (concurrence) (Emphasis added).

The same view has been espoused more recently, as follows

> "[T]he Court wishes to reiterate that any truly private organization or association, such as a country club, a social club, *a business partnership*, or a political association would be beyond the bounds of government regulation with regard to membership. . . . To allow such a governmental intrusion would violate not only the First Amendment, but the very essence of the Bill of Rights."
>
> *Wright v. Cork Club*, 315 F. Supp. 1143, 1156-57 (S. D. Tex. 1970) (Emphasis added).

Of course, the question of the constitutionality of Title VII in regard to partnership can be avoided by construing

the act as not applying to an invitation to partnership. Such construction is a proper one, we submit, especially when one considers the fact the act is designed to avoid discrimination by an employer against an employee. As an associate, plaintiff was an employee. As a partner, she would have become an employer. Nothing in the act requires an employer to convert an employee into an employer.

The statutory, common law, and constitutional barriers to application of Title VII to partnership decisions gain particular significance within a law firm partnership. Because of the sensitive nature of the relationship between a law firm and its clients, it becomes particularly important for each partner to have the confidence and trust of the other partners. A mistake by any partner becomes, in the eyes of the law, the mistake of the partnership and accordingly threatens the professional reputation and economic well-being of all the partners. Within this context, the notion that one might be required by Title VII to enter into a partnership with another against his or her will becomes particularly disturbing. Thus, within such an environment, the admission of new partners must be governed by the consent of the existing partners, not by a federal statutory scheme.

Defendant recognizes that one court has determined that the opportunity to become a partner in a law firm is a "term, condition, or privilege of employment" within the meaning of Title VII. *Lucido v. Cravath, Swaine & Moore*, 425 F. Supp. 123 (S. D. N. Y. 1977). The *Lucido* court, however, did not adequately analyze either the constitutional or the common law barriers to application of Title VII to a law firm partnership. Moreover, even the *Lucido*

court appeared to recognize that Title VII does not extend to the relationship of partners among themselves. Absent such an extension, the reasoning of the *Lucido* opinion is clearly flawed. If the partnership is entitled to distribute profits, make decisions regarding advancement within the partnership, and even terminate or exclude existing partners on whatever basis it chooses, applying Title VII standards to admission criteria would be a meaningless exercise. Under this approach, a partnership could be forced to admit a person to partnership one day and then with impunity could throw him or her out the next. Defendant respectfully submits that the *Lucido* opinion was wrong, and that the question of admission to partnership remains outside the scope of Title VII.

II.

COUNT II OF PLAINTIFF'S COMPLAINT FAILS TO STATE A CLAIM AGAINST KING & SPALDING UPON WHICH RELIEF CAN BE GRANTED.

Count II of plaintiff's Complaint alleges a violation of the Equal Pay Act. 29 U. S. C. § 206(d). The statute of limitations for an Equal Pay Act claim is two years, with an extension to three years in the case of a willful violation. 29 U. S. C. § 255(a). Thus, even under the most favorable reading of plaintiff's complaint, Count II can only relate to discrimination in pay occurring since February, 1977.

Assuming *arguendo* that plaintiff could establish the factual predicates to an Equal Pay Act claim ("jobs the performance of which requires equal skill, effort, and responsibility") in the context of a large law firm divided

into different departments and where each attorney has individual assignments, it is clear that no such claim can be asserted by plaintiff. The Affidavit of James M. Sibley summarizes the policies of King & Spalding regarding associate compensation which have been in effect at all times since plaintiff was employed by the firm. Stated simply, throughout this period Defendant has adhered to a system under which all members of a given class of associates have received the same gross compensation, including bonuses. With certain variances for prior experience such as clerkships, an associate's "class" for purposes of compensation is determined by the year in which he or she joined the firm. The firm's business records, as summarized in the Affidavit of Denise Hatter, reveal that throughout the period from February, 1977 through June, 1978, plaintiff received the same gross compensation as all other members of her class of associates.

Beginning in July, 1978, plaintiff was the sole member of her class of associates, the other members having been admitted to the partnership, or having moved on to other employment. Plaintiff was advised in May, 1978, that she would not be invited to become a partner and was encouraged to find other employment. Accordingly, she was no longer comparable to other associates in that (1) she was the only associate remaining in her class, (2) she was, presumably, actively seeking other employment, and (3) she had been advised that she would not be invited to become a partner in the firm. Nonetheless, as the Hatter Affidavit establishes, she remained the highest paid associate in the firm in 1978 and 1979 and even received a bonus that equaled or exceeded that paid to any other associate in both years. Thus, plaintiff clearly received

compensation which was equal to or greater than that of associates with similar responsibilities.

Plaintiff may contend that the Equal Pay Act was violated because her pay in 1978 and 1979 did not equal that of the associates in her class who became partners in 1978. Clearly, plaintiff's compensation for the period after July, 1978 cannot be compared to the income of these individuals as partners, because the Equal Pay Act only prohibits *employers* from paying wages *to employees* at a rate less than the rate paid *to employees of the opposite sex*. The members of plaintiff's class who were admitted to partnership were not "employees" after July, 1978. *See Burke v. Friedman, supra.* Thus, to the extent that plaintiff's Equal Pay Act claim is based on the fact that she received less income than did the persons who were admitted to the partnership in 1978, it is not legally cognizable under the Act.

Plaintiff also asserts in her Complaint that she received no salary increases after January 1, 1979. The Equal Pay Act in no way grants an employee an inherent right to receive wage increases. Rather, the Act focuses on whether an employee is paid at a lower *rate* than a comparable employee of the opposite sex. The Affidavit of Denise Hatter establishes that no associate attorney employed by King & Spalding was paid at a higher rate than plaintiff at any time during 1979. In fact, the Hatter Affidavit shows that plaintiff was the highest paid associate in the firm in 1979. In light of these facts, it is clear that plaintiff has no claim whatsoever under the Equal Pay Act.

III.

COUNT III OF PLAINTIFF'S COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Count III of Plaintiff's Complaint alleges a pendent state law claim for breach of contract. If Defendant's Motions To Dismiss Counts I and II are granted, there will be no federal question before the Court and Count III should also be dismissed. In *United Mine Workers v. Gibbs,* 383 U. S. 715, 726 (1966), the Supreme Court explained that "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." This Court has directly applied the *Gibbs* standard in cases involving pendent state claims. See *Peller v. Retail Credit Co.,* 359 F. Supp. 1235, 1237 (N. D. Ga. 1973), aff'd. 505 F. 2d 733 (1974); *Dudley v. Southeastern Factor & Finance Corp.,* 315 F. Supp. 1019 (N. D. Ga. 1970), reversed on other grounds 446 F. 2d 303 (5th Cir. 1971), cert. den. 404 U. S. 858 (1971).

As the Affidavit of James M. Sibley reveals, associates are not employed by King & Spalding for any particular term. Rather, the firm and the associate understand that an associate is free to leave at any time that he or she chooses. Similarly, the firm retains its right to discharge an associate at any time. In short, associates, including plaintiff, are hired by the firm for an indefinite term and fall within the statutory rule that "[a]n indefinite hiring may be terminated at will by either party." Ga. Code Ann. § 66-101; *see Lambert v. Georgia Power Co.,* 181 Ga. 624 (1936); *Ely v. Stratoflex,* 132 Ga. App. 569 (1974).

Under Georgia law, an employment contract which is terminable at will imposes no executory obligations on either party and can be terminated by either party for any reason or no reason at all. *Odom v. Bush,* 125 Ga. 184 (1906); *Lowe v. R. C. Cola Co.,* 132 Ga. App. 37, 40-41 (1974). In a recent opinion, the Georgia Court of Appeals applied this principle in holding that an employee at will could not assert a claim for breach of contract based on his employer's failure to promote him. The Court explained:

> "[T]he contract was for an indefinite term and was terminable at will; and, as Murphine concedes in these circumstances, no claim for failure to promote can be maintained. 'It is the general rule that a hiring indefinite as to time is terminable at the will of either party and creates no executory obligations. '. . . The oral promises [to promote] could not be enforced because the underlying employment contract being terminable at will, is unenforceable."
>
> *Murphine v. Hospital Authority of Floyd County,* 151 Ga. App. 722, 723 (1979).

This opinion applies with equal force to the facts of this case and bars plaintiff's claim of breach of contract.

CONCLUSION

For the foregoing reasons explained in Section I above, Count I of plaintiff's Complaint should be dismissed for lack of subject matter jurisdiction. For the reasons explained in Sections II and III above, Counts II and III of plaintiff's Complaint should be dismissed

for failure to state a claim upon which relief can be granted.

Respectfully submitted,

LOKEY AND BOWDEN

By /s/ Hamilton Lokey

/s/ Gerald F. Handley

Attorneys for Defendant
King & Spalding

NOTICE TO TAKE DEPOSITION

To: Elizabeth Anderson Hishon and
Emmet C. Bondurant, As Attorney for Plaintiff

PLEASE TAKE NOTICE THAT pursuant to Rule 30 of the Federal Rules of Civil Procedure, defendant King & Spalding will, through its attorneys, take the deposition under oral examination of plaintiff Elizabeth Anderson Hishon at 9:30 A.M. on Monday, April 7, 1980 in the offices of Lokey and Bowden at Suite 2500, Tower Place, Atlanta, Georgia 30326.

Said deposition will be limited to questions raised by defendant's Motions to Dismiss as to whether plaintiff has properly invoked the jurisdiction of this Court by timely filing a charge of discrimination with the Equal Employment Opportunity Commission within 180 days of any alleged act of discrimination by defendant. Defendant reserves its right to depose plaintiff as to all other matters at a later date, should the Motions to Dismiss not be granted. You are requested to bring with you any and all documents or other tangible things in

your possession or to which you have access which relate or pertain to the subject matter of defendant's Motions to Dismiss and your allegations that you timely filed a Charge of Discrimination with the Equal Employment Opportunity Commission within 180 days of any act of alleged discrimination by defendant.

The deposition noticed herein will continue from day to day until its conclusion.

This 31st day of March, 1980.

LOKEY AND BOWDEN
By /s/ Hamilton Lokey

/s/ Gerald F. Handley

Attorneys for Defendant

March 31, 1980

Judge Newell Edenfield
United States District Court
Northern District of Georgia
Richard Russell Building
Atlanta, Georgia 30303

Re: Elizabeth Anderson Hishon v. King & Spalding C. A. No. 80-326A

Dear Judge Edenfield:

The above litigation, in which I represent the plaintiff and Ham Lokey represents the defendant, has been assigned to Your Honor.

Because of the nature of the issues involved, I believe that it would be helpful for Your Honor to schedule a very early chambers conference with counsel for the purpose of (a) establishing an orderly sequence in which threshold legal issues raised by the defendant can be resolved, (b) deferring discovery on other issues until the threshold issues have

been resolved, and (c) the entry of an appropriate protective order protecting the confidentiality of information disclosed by discovery, and other similar matters.

While I would prefer to treat this case just like any other case, the fact is that this case is not like any other case in which I have been involved.

Unlike most litigation, all of the parties are lawyers and friends with whom I have previously had very warm and close relationships and for whom I have a high regard. The plaintiff, Betsy Hishon, is the wife of my partner Bob Hishon, and is now an associate of Haas, Holland, Lipshutz, Levison & Gibert, one of Atlanta's fine law firms. The defendant, King & Spalding, is perhaps Atlanta's most prestigious law firm with which my partner Bob Miller's younger brother, Jim, is an associate, and my partner Eric Ranney's brother-in-law, Clarence Ridley, is a partner.

The decision to lodge a charge of sex discrimination against a major law firm like King & Spalding is not one that has been made lightly and without careful consideration of the consequences. At the same time, we recognize that discovery in this case is likely to involve some of the most private and sensitive decisions that a law firm makes—including its evaluation of the professional qualities of its present and former partners and associates, and, in the damage phase of the case, the compensation of its partners.

I don't want to be forced to explore these sensitive issues by discovery unless it becomes necessary to do so in the course of the litigation—nor do I want King & Spalding to feel that discovery into their private affairs is being used as any kind of lever to coerce the firm to settle a claim which it believes to be without merit.

For these reasons, I want to take the unusual step of proposing procedures which I believe are pri-

marily for the benefit of the other side, but which I believe are reasonable and justified by the nature of the parties and the issues.

1. *Early Resolution of Threshold Issues*

Although King & Spalding has not yet answered, there are at least two threshold issues which I anticipate will be raised as defenses and which I believe the Court should resolve at the outset, before allowing discovery to proceed as to other issues.

A. *Whether the partnership decisions of a law firm are subject to Title VII.*

King & Spalding will probably contend that Title VII does not apply to its decisions as to whom from among its associates it will promote to partnership, and that the firm is, therefore, free to exclude women, blacks or Jews or any other invidious classes from the partnership.

Although we believe that this issue has been resolved the other way by at least one district court [*see Lucido v. Cravath, Swaine & Moore,* 425 F. Supp. 123 (S. D. N. Y. 1977), *cf.* Note, *Applicability of Federal Antidiscrimination Legislation to the Selection of a Law Partner,* 76 Mich. L. Rev. 2826 (Dec. 1977)], the question is plainly a threshold issue that can and should be decided at the outset with discovery limited to that issue.

If King & Spalding were to prevail on this threshhold question, discovery on the merits aimed at establishing that it has in fact discriminated against women and other minorities in its employment, promotion and compensation decisions, as well as discovery into matters of partner compensation for the purpose of establishing damages under Title VII, would be moot.

If the plaintiff prevails on this threshhold issue, then discovery can then proceed into the liability

phase of the case*—not prematurely, but as a matter of necessity.

B. *Whether plaintiff's claim is premature.*

King & Spalding may contend, based on Your Honor's ruling in *Grimes v. Pitney-Bowes, Inc.*, Civil Action No. C79-779A (Dec. 1979), that, because the EEOC issued a right-to-sue letter to plaintiff in accordance with the EEOC's regulations before expiration of the 180-day conciliation period, the complaint is premature and should be stayed until the end of the 180-day period.

If such a motion is made, it should be also addressed promptly at the outset before the commencement of discovery as to other issues. In that event, the plaintiff will want to conduct limited discovery for the purpose of establishing of record the parties' unsuccessful attempts at conciliation and that there appears to be no reasonable likelihood that further attempts at conciliation will accomplish anything but delay.

2. *Bifurcation of Liability and Damages*

I recognize that any law firm would be reluctant to disclose matters relating to the profitability and the method of determining the amount and trends of partnership income to other lawyers even under a protective order.

So that no one will feel that we are attempting to take unfair advantage of this fact in order to put pressure on the defendant, we would propose that the Court bifurcate the trial of liability and damages, and

---

*Consistent with this approach that the case proceed in stages, and that no issue need be addressed (or discovery be required) in advance of the necessity for doing so, plaintiff is proposing that the Court try the liability phase of the case in advance of and separate from the damage phase so that King & Spalding will not have to reveal income and profitability information in discovery until plaintiff has first established liability.

stay discovery as to damages until liability has first been determined in favor of the plaintiff.

3. *Protective Order Placing Discovery Under Seal*

It is inevitable that many of the facts that are likely to be disclosed during merits discovery may, patentially at least, be embarrassing to many fine lawyers who were formerly or are presently practicing with King & Spalding. To avoid unnecessarily embarrassing any of these members of the Bar, I believe that the Court should enter a comprehensive protective order placing all answers to interrogatories by either side, the depositions and documents (and perhaps even briefs and transcripts of any hearings) under seal. The Court may also want to consider holding all hearings *in camera*.

In short, we are prepared to agree to any reasonable protective order, so that the case can be litigated fully and fairly, without any party being under any pressure to avoid publicity or public embarrassment.

Very truly yours,

/s/ Emmet J. Bondurant
Emmet J. Bondurant

EJB:emb
cc: Hamilton Lokey, Esq.

April 16, 1980

Hamilton Lokey, Esq.
Lokey & Bowden
2500 Tower Place
3340 Peachtree Road, N. W.
Atlanta, Georgia 30326

Re: *Hishon v. King & Spalding*

Dear Ham:

I have reviewed Plaintiff's First Interrogatories to King & Spalding in the light of Judge Edenfield's

ruling in chambers on Tuesday, April 15th. Judge Edenfield ruled that he wanted to consider initially only the question of whether Title VII applied to King & Spalding's decisions with respect to Mrs. Hishon, and that he does not want to consider King & Spalding's statute of limitations defense until some future date. Judge Edenfield also made it clear that he would not allow any discovery related to King & Spalding's evaluation of the individual plaintiff at this time.

In light of these rulings, I would like for King & Spalding to answer Interrogatory 1, Interrogatory 5, Interrogatories 6, 7 and 8 (all of which relate to King & Spalding's interstate commerce defenses), Interrogatory 10, Interrogatory 12, Interrogatory 13, and Interrogatory 14.

Since the remaining interrogatories relate either to your statute of limitations defense or request the identification of types and categories of records maintained by King & Spalding that would be relevant to the merits, these interrogatories need not be answered or otherwise responded to at this time.

I do understand, however, that you have agreed on behalf of King & Spalding that the firm will preserve all documents identification of which is called for in the First Set of Interrogatories (No. 15, for example) even though certain of the interrogatories are not required to be answered at this time.

If you or King & Spalding find it unduly burdensome to respond to a particular interrogatory, I would suggest that you discuss the specific problem with me informally and perhaps we can reduce the burden by agreement or stipulation.

Sincerely,

/s/ Emmet J. Bondurant
Emmet J. Bondurant

EJB:emb

cc: Judge Newell Edenfield
Mrs. Elizabeth A. Hishon

ORDER

Counsel for both parties have moved the Court for an early determination of the threshhold issue raised in paragraph 1 of the Motions to Dismiss filed by defendant King & Spalding, in which the defendant seeks dismissal of Count One of the complaint on the ground that Title VII does not apply to the decisions of defendant with respect to the plaintiff. It appears to the Court that these contentions involve controlling questions which should be decided before discovery proceeds to other issues, and that disposition of this litigation will be materially advanced by an early ruling on these issues.

IT, THEREFORE, IS HEREBY ORDERED:

(1) That the parties are hereby granted 90 days in which to complete discovery limited to the threshhold issue stated above;

(2) That the plaintiff shall have until 30 days after the completion of discovery within which to file her brief or other response to the defendant's Motions to Dismiss directed to the threshhold issue stated above, and defendant shall have 30 days thereafter to file a reply brief or other responses; and

(3) That all other matters, including briefing by the plaintiff pertaining to the remaining issues raised by the defendant's Motions to Dismiss and discovery by either

party on the merits, is hereby stayed and deferred until further order of the Court.

This 23rd day of April, 1980.

/s/ Newell Edenfield
United States District Judge

Entry of the within and foregoing
Order is hereby consented to
this 21st day of April, 1980.

/s/ Emmet J. Bondurant
Attorney for Plaintiff

/s/ Hamilton Lokey
Attorney for Defendant

ORDER

The parties having hereto consented and good cause having been demonstrated to the Court and the Court having determined that the subject matter of this litigation and the discovery relative thereto will involve matters of a personal and private nature which could adversely affect, not only the parties to this litigation, but third parties as well and pursuant to Rule 26(c) of the Federal Rules of Civil Procedure,

IT IS HEREBY ORDERED:

(1) All documents and tangible things produced or made available to a party in this litigation by any other party, whether pursuant to a request for production, subpoena, consent, or otherwise, shall be maintained in strictest confidence, shall not be disclosed to any person other than the parties, the attorneys and representatives of parties actually involved in the preparation of this action

for trial, or witnesses involved in this action, and shall be used only for the purpose of preparing and prosecuting the above-styled action. All documents produced by a party which are not admitted in evidence at the trial of this action shall be returned, along with any copies to the party originally producing the document immediately following final judgment. All documents and things which are produced by a party and which are admitted as evidence at the trial of this action shall be maintained by the Clerk of the Court under seal and shall not be disclosed to any person pending further order of this Court.

(2) All responses to interrogatories or requests for admissions shall be maintained in strictest confidence and shall not be disclosed to any person other than the parties, the attorneys and representatives of parties actually involved in the preparation of this action for trial and witnesses involved in this action. All such responses on file with the Court shall be maintained by the Clerk under seal and shall not be disclosed to any person pending further order of the Court.

(3) The transcript of all depositions taken in the course of this litigation shall be held in confidence and shall not be disclosed to any person other than the parties, the attorneys and representatives of the parties actually involved in this action and the witness whose deposition was taken. The court reporter recording and preparing the transcript of any deposition shall be given a copy of this order and shall abide by its terms. The originals of all deposition transcripts shall be maintained by the Clerk of Court under seal pending further order of this Court.

(4) All pleadings, affidavits and briefs filed in this case, other than plaintiff's complaint and defendant's answer, shall be maintained by the Clerk of Court under seal, pending further order of this Court and after the date of this order all documents filed by the parties shall be contained in envelopes containing the caption of the case and the following legend:

FILED UNDER SEAL AND SUBJECT TO PROTECTIVE ORDER OF THE UNITED STATES DISTRICT COURT.

This 23rd day of April, 1980.

/s/ Newell Edenfield
United States District Judge

Entry of the within and foregoing
Order is hereby consented to
this 21st day of April, 1980.

/s/ Emmet J. Bondurant
Attorney for Plaintiff

/s/ Hamilton Lokey
Attorney for Defendant

PLAINTIFF'S FIRST INTERROGATORIES TO KING & SPALDING

Plaintiff requests that defendant King & Spalding answer in writing, and under oath, the following written interrogatories within thirty (30) days of the date of service hereof in conformity with Rule 33 of the Federal Rules of Civil Procedure.

Definitions and Instructions

As used in these interrogatories, the following terms shall have the following definitions:

1. *Defendant* means King & Spalding and all partners, associates, employees, agents, attorneys and other persons employed by or acting for or on behalf of King & Spalding.

2. *Associate* shall mean a member of the Bar employed by defendant, but excluding partners in defendant.

3. *Time Period* shall mean January 1, 1972—December 31, 1979, unless a different time period is specifically stated.

4. *Document* shall mean letters, reports, records, transcriptions, memoranda, minutes, papers, stenographic or handwritten notes, writings, magnetic tapes, discs, and other media, computer cards, tapes, printouts or other computer or machine readable records, statistical computations, compilations, studies, publications, books, and all other forms of recording and preserving information.

Whenever an interrogatory requests that defendant "identify" a person or document or oral communication, the following information is being requested and is hereby incorporated by reference as a part of each interrogatory, and must be answered accordingly:

1. *Person*—To identify a natural person, please state his full name, present or last known address, and his present or last known position or business affiliation (designating which);

2. *Document*—To identify a document means to provide the following information even though the document is deemed privileged or subject to any claim of privilege:

(a) The title or other means of identification of each such document:

(b) The date of each such document;

(c) The author of each such document, including his name, address, telephone number, and employer;

(d) The recipient or recipients of each such document, and for each recipient listed include his name, address, telephone number, employer and date of receipt;

(e) The present location of each such document in the care, custody, or control of defendant;

(f) The names, addresses and telephone numbers of any and all persons who have custody or control of each such document;

(g) Whether defendant claims any privilege with respect to each such document, and, if so, the factual and legal basis for the alleged privilege.

3. *Oral Communication*—To identify an oral statement, representation, or other oral communication, please state the nature of the communication, the substance of the communication, by whom and to whom such communication was made, the date of the communication, all persons present at the time of the communication who witnessed or heard the communication. and the place at which the communication occurred.

Attachment of Copies of Documents in Lieu of Identification

In lieu of identification of a document, defendant may attach a legible copy of the documents to its answers to these interrogatories, *provided* that the documents so at-

tached are specifically marked so as to indicate the particular interrogatory to which each document is deemed responsive.

INTERROGATORIES

1.

Please provide the following information with respect to the defendant:

(a) When was the defendant founded and by whom?

(b) If the defendant is the successor to any previous law firms, please provide the following information with reference to each such antecedent law firm:

(1) The name(s) of each such antecedent law firm.

(2) The dates of existence of each such antecedent law firm.

(3) The names of the partners of each such antecedent law firm.

(c) (1) Has the defendant or any partner thereof prepared any document which describes or summarizes the history of the defendant?

(2) If so, please identify each such document.

(d) (1) When did defendant revert to the name "King & Spalding"?

(2) Please identify all documents which refer to the reasons that defendant decided to use the name "King & Spalding."

(3) To the extent the reasons for the defendant's reverting to the name "King & Spalding" are

not fully stated in the document identification of which is requested in subparagraph (2) above, please state such reasons.

(e) (1) Did the defendant have a written partnership agreement during any of the Time Period?

(2) If the answer is "yes," please identify the partnership agreement and all amendments thereto.

(f) (1) Were there any portions of the partnership agreement of defendant in effect during the Time Period which are not fully set forth in the written partnership agreements referred to in subparagraph (e) above?

(2) If the answer is "yes," please state the full terms of the portions of the partnership agreement that were not in writing, and the time periods during which such unwritten portions of the partnership agreements were in effect.

(g) (1) Does the defendant have a partner's manual or other written compilation of its internal policies and procedures?

(2) If so, please (A) identify each such manual or compilation, (B) state how long such manual or compilation of the defendant has been in effect, and (C) describe generally the contents of each such manual.

(h) Please (1) describe the organizational structure of defendant during the Time Period, and (2) identify all committees, departments and administrative positions of the defendant, and state with respect to each such committee, department or administrative position:

(A) Its name.

(B) Identify all documents that set forth the duties and responsibilities of each such committee, department, or administrative position, or, if such duties are not fully set forth in written form, state the duties and responsibilities of each.

(C) The names of the members of each such committee or department, or the holder of any administrative position, during each year since January 1, 1972.

(D) Identify by categories the records maintained by each such committee, department or administrative position.

(i) With respect to "Administrative Partner" positions of the defendant which existed at any time during the Time Period, state the following information:

(1) Identify the title of the position.

(2) (A) Identify all documents which set forth or define the duties and responsibilities of such position, and (B) if such duties and responsibilities are not fully set forth in written form, state the unwritten powers and duties of each such position.

(3) Identify each person holding such position during the Time Period.

(4) Identify by type or category and a general description of contents the records maintained by or under the supervision of the person in such position.

(j) Does the defendant maintain minutes or other documents reflecting the substance of (1) general meetings

of defendant's partners, (2) general meetings of defendant's partners and associates, (3) meetings of committees of the defendant, and (4) meetings of departments of the law firm, and, if so, for what period of time have such minutes or other documents been maintained?

(k) Please identify all documents which refer to or reflect the following information pertaining to (1) the defendant's policy and procedure for determining capital or other financial contributions required by the defendant in connection with the admission of a new partner to the firm, (2) the percentage of ownership of the assets of the defendant acquired by a new partner, (3) the percentage or amount of firm capital or assets which a partner is entitled to receive as a matter of right from the firm upon voluntary withdrawal, expulsion, or death.

(l) Please (1) identify all documents which set forth the procedure, method, system or criteria used by the defendant or any committee thereof to determine the compensation of partners in defendant, and (2) if such procedure or method is not fully set forth in any documents, please state the procedure, method, system or criteria used by the defendant to determine the compensation of partners.

(m) (1) Did the defendant maintain professional malpractice insurance during the Time Period?

(2) If so, please state the monetary limits of such policies applicable to errors, omissions or professional malpractice by (A) partners of defendant, (B) associates of defendant.

(n) (1) Did the defendant have any pension, profit sharing or retirement plan in effect during the Time

Period that covered both partners and associates; if so (2) please identify each such plan and any amendments thereto.

2.

(a) Please identify all partners who were ultimately admitted to partnership in the defendant, but whom the defendant declined to make partners at the time that any other member of their "class" was admitted to partnership.

(b) With reference to each individual identified in response to Interrogatory 2(a) above, please identify all documents which refer to, reflect or evidence (1) any recommendation or decision that defendant make, refrain from making, or delay making the individual a partner in defendant at the time that other members of the individual's class were being considered, and (2) that defendant reconsider its former decision not to make such individual a partner after other members of the same class had been made partners, and (3) the evaluation of the individual professional performance, personal characteristics of eligibility or fitness for partnership in defendant.

(c) Identify all minutes or other records of any meeting of defendant (or of any committee thereof) at which any vote was taken to make or recommend making, or refrain from making, or delay making said individual a partner.

3.

With respect to plaintiff, please state the following information:

(a) Please state the dates of plaintiff's employment by the defendant.

(b) Please state the amount of plaintiff's compensation in (1) salary, and (2) bonus, during each calendar year of her employment by defendant.

(c) Please identify (1) all documents which refer to, reflect or evidence any evaluation of plaintiff made by defendant or any partner or associate of defendant at the time plaintiff was interviewed either at Columbia University or in Atlanta, and (2) any documents which reflect any recomemndation or vote to offer, or to refrain from offering, employment to plaintiff in 1971 or 1972.

(d) Please identify all documents which constitute or reflect any formal or informal evaluations by defendant (or any partner, associate, committee or employee thereof) of the quality of plaintiff's work as a lawyer, her personal attributes, her progress toward or eligibility for partnership, the profitability of or fees generated by her legal work, the clients brought to the defendant by plaintiff, or her relative merits in comparison with other associates.

(e) Please identify all documents received by defendant from clients or other persons who were not partners in or employed by defendant that refer to or comment upon the quality of plaintiff's work as a lawyer, her personal attributes, her progress toward or eligibility for partnership, or her relative merits in comparison with other associates.

(f) Please identify all documents which refer to, reflect or comment upon (1) any meeting between one or more partners of defendant at which plaintiff, or the quality of plaintiff's work as a lawyer, her personal attributes, her progress toward or eligibility for partner-

ship, or any other qualifications for partnership, were considered, discussed, or voted upon, (2) any meeting between one or more parties of defendant and plaintiff at which such partner(s) of defendant communicated to plaintiff any evaluation of plaintiff's quality of work as a lawyer, her personal attributes, her progress toward or eligibility for partnership, her relative merits in comparison with othe associates, and (3) identify all oral communications of such evaluations of plaintiff that were communicated by defendant, or any partner thereof, to plaintiff.

(g) Please identify all computer reports or other other records that reflect on a monthly, quarterly, annual or other basis (1) the number of billable hours worked by plaintiff, (2) the hourly rates at which defendant billed services performed by plaintiff, (3) the fees collected by defendant for services performed by plaintiff, (4) the relative number of billable hours and profitability of plaintiff as compared with other associates or partners of defendant, and (5) the fees received by defendant from clients who were considered to have been brought to defendant by plaintiff.

(h) Please identify all communications passing between one or more partners of the defendant which refer to, reflect or contain:

(1) Any expression of opinion concerning plaintiff's quality of work as a lawyer, her personal attributes, her progress toward partnership, her relative merits in comparison with other associates, or any recommended, proposed or suggested action with reference to plaintiff.

(2) The eligibility or desirability of plaintiff's becoming a partner in defendant.

(3) Any claims made by plaintiff or that plaintiff might have against the defendant under Title VII of the Civil Rights Act of 1964, the Equal Pay Act, or any other federal law or regulation.

(4) The continuation, duration or termination of plaintiff's employment by the defendant, or the placing of any limitations on plaintiff's work, her access to clients or associates of the firm.

(5) Any actual or potential charge of employment discrimination filed by plaintiff.

(6) Any actual, suggested or proposed action by the defendant resulting from or connected with the filing of a charge by plaintiff with the EEOC.

(7) The consideration by defendant as a whole, or by any department, committee or group of partners of defendant, of whether the plaintiff should or should not become a partner in defendant.

(8) The reasons that defendant refused to make plaintiff a partner in the defendant.

(9) Any objection by any partner of the defendant to any proposal, recommendation or action by defendant (or by any department, committee or partner) that plaintiff be admitted or not be admitted or voted upon for admission as a partner in defendant, or that any previous decision made by defendant be (or not be) reconsidered or modified.

4.

If you contend that defendant's decision not to make plaintiff a partner in defendant was based on any specific

errors, omissions or deficiencies in plaintiff's performance of her professional duties and responsibilities in representing or on behalf of any clients of the defendant, please identify each such matter by stating:

(1) the name of the client;

(2) the name of the matter;

(3) the file or other identifying number of the matter; and

(4) describe the specific error, omission or other difficulty in plaintiff's performance; and

(5) identify (A) the persons whom defendant contends have personal knowledge of the facts or on whom defendant intends to rely for the expression of any opinion concerning any alleged errors, omissions or deficiencies in plaintiff's performnce in connection with a specific matter or client, and (B) the documents that defendant contends refer to, reflect or evidence any error, omission or deficiency in plaintiff's performance.

5.

Please identify all documents which state, in whole or in part, the standards, criteria, procedures or policies utilized by defendant during the Time Period concerning the following subjects:

(a) Evaluation of Associate Performance, including but not restricted to (1) criteria for evaluation of associates, (2) coordination of evaluation by partners, (3) communication to partners and to associates individually the results of associate evaluations, (4) criteria for

admission to partnership, and (5) decisions or recommendations of termination of associates.

(b) Criteria for advancement to partnership.

(c) Compensation policies for legal personnel.

(d) Establishment of number of lawyers to be hired, or admitted to partnership.

(e) Equal employment practice policies pertaining to legal personnel.

(f) Hiring, including but not limited to (1) criteria for job offer, (2) Recruiting Committee procedures, (3) policies regarding employment of lawyers.

6.

With reference to the Fifth Defense stated in the answer that "[p]laintiff's claims under Title VII are barred because defendant is not a person engaged in an industry affecting commerce within the meaning of Title VII," please state the following information:

(a) Please state all facts on which defendant relies to support such contention.

(b) Please identify all documents on which defendant relies to support such contention.

(c) Please identify all persons who are known to defendant or to defendant's attorneys to have personal knowledge of such facts.

7.

With reference to the allegations of paragraph 2(a) of the Eighth Defense of the answer that "defendant de-

nies that it is a person engaged in an industry affecting commerce," please state the following information:

(a) Please state all facts on which defendant relies to support such contention.

(b) Please identify all documents on which defendant relies to support such contention.

(c) Please identify all persons who are known to defendant or to defendant's attorneys to have personal knowledge of such facts.

8.

(a) Does defendant contend that it is not engaged in interstate commerce?

(b) If so, please state the following information with respect to defendant's last complete fiscal year:

(1) The total fees received by the defendant for the rendition of legal services and the amount of fees billed by defendant's (A) Atlanta office and (B) defendant's Washington office.

(2) The total revenues of the defendant derived from legal services rendered to clients with respect to litigation pending in Georgia, real estate transactions involving real property located exclusively in Georgia, bond or other securities, offerings for offerors located exclusively in Georgia where all the purchasers located within Georgia.

(3) The total revenues derived by defendant from the following:

(A) The rendition of legal services with reference to any court or administrative proceedings located outside Georgia.

(B) The rendition of legal services with reference to any real estate transactions involving property outside the State of Georgia.

(C) The rendition of legal services in connection with any offering or sale of securities by an issuer having its principal place of business outside the State of Georgia, or which required registration, or exemption under the laws of a state other than Georgia, or which was closed outside the State of Georgia.

(D) The rendition of any other legal services to clients whose principal offices were located outside the State of Georgia, and which involved the application of procedural or substantive law of a state other than Georgia.

(4) (A) The number of trips made by lawyers of defendant to points outside Georgia in the course of rendering professional services for clients, (B) the number of days spent by lawyers of defendant outside the State of Georgia in the course of rendering professional services for clients, and (C) the cost of such trips to the defendant or its clients.

(5) (A) The number and (B) cost of long distance telephone charges incurred by defendant in the course of rendering professional services for clients.

9.

Please (a) identify all documents which refer to reflect, or support the allegations made by defendant in the following paragraphs of the Eighth Defense of its answer or which are inconsistent with such allegations, and (b)

identify all persons known to defendant or to defendant's attorneys to have personal knowledge of the facts alleged in such paragraphs, or of facts inconsistent with such allegations:

(1) Eighth Defense, Paragraph 11.

(2) Eighth Defense, Paragraph 12, second full paragraph.

(3) Eighth Defense, Paragraph 12, third full paragraph.

(4) Eighth Defense, Paragraph 12, fourth full paragraph.

(5) Eighth Defense, Paragraph 13, first paragraph, first full sentence.

(6) Eighth Defense, Paragraph 17(a).

(7) Eighth Defense, Paragraph 17(c).

(8) Eighth Defense, Paragraph 17 (d).

(9) Eighth Defense, Paragraph 17(e).

(10) Eighth Defense, Paragraph 17(f).

10.

With reference to the allegations of Paragraph 9 of the Eighth Defense that defendant had a "practice of not employing permanent associates," please state the following information:

(a) When and how was this policy adopted?

(b) Is this policy reflected by any documents, and, if so, please identify all such documents?

(c) (1) Has the defendant made any exceptions to the policy since its adoption? If so, (2) please describe each individual for whom an exception was made, (3) the reasons for the exception, and (4) identify all documents reflecting such reasons.

(d) (1) Under defendant's policy, does an associate have the alternative of remaining as an employee of the firm? If so, please state (2) the length of time that the associate is permitted to remain an employee of the firm, and (3) any changes or modifications in the compensation, terms and conditions of employment that would apply to an associate who has been denied partnership that would not be applied to other associates who have not been refused admission to partnership.

11.

With reference to the allegations of paragraph 17(i) of the Eighth Defense of defendant's answer that defendant "denies that it has failed to take affirmative action with respect to female lawyers," please state the following information:

(a) Describe all "affirmative action with respect to female lawyers" taken by defendant during the Time Period.

(b) With respect to each such "affirmative action," state whether such affirmative action was objected to or opposed by any partner of defendant and, if so (1) identify the partner opposing such action, and (2) state the grounds of his opposition.

(c) Identify all documents that refer to, reflect, or support your contention that defendant took "affirmative action with respect to female lawyers."

(d) Identify all persons having personal knowledge of the fact that defendant took "affirmative action with respect of female lawyers."

12.

(a) Has the defendant given any consideration to the applicability of Title VII of the Civil Rights Act to (1) defendant's practices, policies, procedures or decisions to employ, refrain from employing, discriminate in the employment of, or terminate the employment of lawyers as associates in defendant, and (2) defendant's decision to make, refrain from making, or delay making or "inviting" an associate to become a partner in defendant, other than in specific connection with the charge filed by plaintiff with the EEOC, and the pending suit filed by plaintiff?

(b) If the answer to subparagraph (a) is "yes," identify all documents which refer to, reflect or evidence defendant's consideration of any of the subjects described in subparagraph (a).

13.

(a) Has defendant employed any outside consultant to make any evaluation or recommendation with respect to the organizational structure of the defendant?

(b) If so, please identify such consultant and identify any report or recommendations made by such consultant.

14.

Please identify the partners or employees of defendant who are primarily responsible for (a) collecting the information contained in the answers to these interrogatories, and (b) locating the documents identification of which is requested in these interrogatories.

15.

(a) Does the defendant presently have documents in its possession from which the following information for the period January 1, 1965-December 31, 1979 can be derived at a later stage of this case?

(1) The number of partners in defendant who were: (A) males, and (B) females.

(2) The identity and number of associate lawyers employed by the firm who were: (A) males, and (B) females.

(3) The identity and number of lawyers or law students who were interviewed by the defendant for possible employment who were: (A) males, and (B) females.

(4) The identity and number of lawyers or law students to whom the defendant extended offers of employment who were: (A) males, and (B) females.

(5) The identity and number of law students who were employed by the defendant for any portion of the summer or at any other time of the year who were: (A) males, and (B) females.

(6) The identity and number of lawyers who became partners of the defendant who were: (A) males, and (B) females.

(7) The identity and number of lawyers employed by the defendant who were terminated at the initiative or suggestion of the defendant who were: (A) males, and (B) females.

(b) If the defendant does not have information in any of the categories described above for the complete

period January 1, 1965-December 31, 1979, please state the dates for which such information is available.

(c) Will defendant voluntarily agree without Court order to preserve records from which the information described in subparagraph (a) can be derived, pending a final disposition of this case?

/s/ Emmet J. Bondurant
/s/ Jeffrey M. Smith

Attorneys for Plaintiff

PLAINTIFF'S FIRST NOTICE TO PRODUCE TO KING & SPALDING

Plaintiff requests that defendant King & Spalding produce for inspection and copying by plaintiff, in conformity with Rule 34 of the Federal Rules of Civil Procedure, all documents, identification of which is requested in Plaintiff's First Interrogatories to King & Spalding served contemporaneously herewith which are in the custody, control or possession of the defendant, of any present or former partner thereof, or defendant's attorneys, at the offices of Trotter, Bondurant, Griffin, Miller & Hishon, 2200 First National Bank Tower, 2 Peachtree Street, N. W., Atlanta, Georgia, at 10:00 a.m. on May 12, 1980.

If defendant prefers, plaintiff will inspect such documents at the offices of defendant or defendant's attorneys, or at such other time and place as may be agreed on by the parties.

/s/ Emmet J. Bondurant
/s/ Jeffrey M. Smith

Attorneys for Plaintiff

The Equal Employment Opportunity Commission moves for leave to participate in this suit as *amicus curiae*.

MEMORANDUM IN SUPPORT

The Commission is the agency charged by Congress with enforcing Title VII, Civil Rights Act of 1964, as amended, 42 U. S. C. 2000e *et seq.* (1976), and other federal employment discrimination statutes. See Reorganization Plan No. 1 of 1978, 43 F. R. 19807 (May 9, 1978). The motion to dismiss now before this court presents an important question concerning the scope of Title VII and related statutes: Whether a law firm's decisions as to whom it will admit to partnership are "employment" decisions subject to federal anti-discrimination laws.

The Commission has filed briefs *amicus curiae* on this issue in two other Title VII cases, *Lucido v. Cravath, Swaine & Moore* (No. 75 Civ. 6341: L. P. G., S. D. N. Y.) and *Blank v. Sullivan & Cromwell* (75 Civ. 189: C. B. M., S. D. N. Y.). It is in the public interest that the Commission present its views to this court *Cf.* Rule 29, F. R. App. P.

The Commission understands that there is a protective order entered in this case which places under seal all documents filed subsequent to the complaint. The Commission, if granted leave to participate, agrees to abide by the terms of this order in the same manner as the plaintiff.

Respectfully submitted,

LEROY D. CLARK
General Counsel

JOSEPH T. EDDINS
Associate General Counsel

LUTZ ALEXANDER PRAGER

/s/ SUSAN BUCKINGHAM REILLY
Attorneys

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

2401 E Street, N. W.
Washington, D. C. 20506
(202) 634-6150

May 14, 1980

MEMORANDUM IN OPPOSITION TO MOTION OF EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Comes now the defendant in this case and objects to the participation of the Equal Employment Opportunity Commission as Amicus Curiae or in any other capacity in this suit.

1.

Plaintiff in this case initiated her action against defendant by filing a complaint with the Equal Employment Opportunity Commission (hereinafter EEOC) on November 19, 1979. Thereafter, on November 29, 1979, EEOC unilaterally issued its right to sue letter and thereupon closed its file on this matter. The basis of the right to sue letter was a statement of EEOC that it was too busy to deal with the complaint within 180 days. Having avoided its responsibility when it could have considered the issues in this case as the forum provided by statute, it is wholly inappropriate for the EEOC to now seek to enter this action in this court, either as a partisan on behalf of the plaintiff, or as an adviser to the court.

2.

EEOC acknowledges that it seeks to enter into this case at the request of the plaintiff. The plaintiff is not

an indigent. She is more than adequately represented by competent counsel, who are fully capable of presenting plaintiff's contentions to this court. There is therefore no need for the intervention of EEOC, unless it is designed to influence the court to accept the plaintiff's contentions relative to Title VII. For the EEOC to take a partisan position in this case in this court in support of the plaintiff's contentions raises serious questions as to the impartiality of the EEOC in its statutory function as the forum before which an employer must appear in response to a complaint of discrimination.

3.

Even if this court should decide to allow the EEOC to participate as *Amicus Curiae,* there is no reason to provide the EEOC with access to the discovery materials and papers protected from disclosure by the Consent Protective Order. The EEOC states that it desires to address the pure legal question of "Whether a law firm's decisions as to whom it will admit to partnership are 'employment' decisions subject to Federal antidiscrimination laws." To address this general question, the EEOC does not require access to materials regarding the specifics of plaintiff's claim against a particular law firm. Moreover, were the EEOC allowed access to discovery materials and allowed to express a view on the specifics of this case, the EEOC's role would be more akin to an intervenor under Rule 24B than to a traditional *Amicus Curiae.* The EEOC has not certified that this is an action of "general public importance" as required before it may seek leave to intervene. 42 USC § 2000e 5(f)(1). Further, because the EEOC failed to investigate and conciliate plaintiff's claim in this action, it could not bring its

own action. 42 USC § 2000e 5(f)(1). The Commission should not be allowed to utilize the *Amicus Curiae* device in order to circumvent its statutory duty to investigate and conciliate charges.

4.

The EEOC offers to abide by the Protective Order in effect in this case. Without challenging in any way the good faith of the Attorneys signing the motion for the EEOC, we do express genuine concern over the chances of a breach of the Protective Order should the EEOC have access to the discovery called for by the plaintiff in this case. We have complete confidence in local counsel to abide by the Protective Order. On the other hand, should these sensitive materials fall into the hands of unnamed persons in the heirachy of the EEOC, and be subsequently leaked to the public, the parties would be immediately and irreparably harmed. Our concern stems in part from the recent experience in the Northern District of Georgia in a case of some reknown where the attorney for the prosecution expressed his regrets as to leaks of information harmful to the defendants, assured the court of his innocence in the matter but stated that he could not control the actions of his superiors in Washington who were responsible for the transgressions.

We submit that the motion of the EEOC for leave to intervene in this case should be denied.

Respectfully submitted,

LOKEY AND BOWDEN

By: /s/ Hamilton Lokey
/s/ Gerald F. Handley

KING & SPALDING'S RESPONSE TO PLAINTIFF'S FIRST NOTICE TO PRODUCE

NOW COMES KING & SPALDING, named as defendant in this action, and, pursuant to Rule 34 of the Federal Rules of Civil Procedure, makes and files this Response to Plaintiff's First Notice To Produce, stating as follows:

1.

King & Spalding objects to plaintiff's request that King & Spalding produce documents for inspection and copying at the offices of plaintiff's counsel. All documents which are to be produced in response to plaintiff's First Notice will be produced at a time and place agreeable to counsel for the parties to this action.

2.

King & Spalding objects to Plaintiff's First Notice To Produce to the extent that it requests King & Spalding to produce any documents in the custody, control, or possession of any former partner of King & Spalding on the ground that said request is overly broad and unduly burdensome and upon the ground that a former partner is not a party within the meaning of Rule 34 of the Federal Rules of Civil Procedure.

3.

King & Spalding objects to plaintiff's First Notice To Produce to the extent that it seeks the production of confidential client information. King & Spalding also objects to plaintiff's First Notice To Produce to the extent that it seeks the production of confidential firm documents. King & Spalding is producing documents

under the Protective Order in this case, and subject to and without waiving its objection to producing confidential documents.

4.

King & Spalding objects to plaintiff's First Notice To Produce to the extent that it seeks the production of any documents other than the partnership agreement, and amendments thereto, in effect for King & Spalding during the period from January 1, 1972 through December 31, 1979, and the 1975 Memorandum, on the grounds that discovery of the contents, as opposed to the existence, of any of the other documents identified in King & Spalding's Response to Plaintiff's First Interrogatories, would relate either to a defense asserted by King & Spalding to plaintiff's claim or to the merits of this action, and discovery as to King & Spalding's defenses and the merits of plaintiff's claim has been stayed by the Court's Order of April 15, 1980, pending a ruling by the Court on King & Spalding's jurisdictional objections to plaintiff's claim. Accordingly, King & Spalding states that the only documents which it will produce for plaintiff's inspection and copying at this time are the partnership agreement and amendments thereto, in force and effect during the period from January 1, 1972 through December 31, 1978, and the 1975 Memorandum.

LOKEY & BOWDEN

/s/ Hamilton Lokey
/s/ Gerald F. Handley

Attorneys for Defendant

KING & SPALDING

THE ADMINISTRATIVE PARTNERS

A. *The Lawyer Administrative Partner.* The Lawyer Administrative Partner shall have overall responsibility for recruitment, employment, assignment, evaluation and supervision of all legal and paralegal personnel, with the mandate to insure that professional obligations are carried out on all client matters with quality, service and timely performance and with a view toward the harmony of working conditions for legal and paralegal personnel at King & Spalding. The following matters shall be the responsibility of the Lawyer Administrative Partner, with approval of the Executive Committee as to asterisked matters:

*1. *Evaluation of associate performance*

a. Formulation of criteria for evaluation of associates.

b. Coordination of evaluation by partners.

c. Communication to partners and to associates individually results of associate evaluation at least annually.

d. Establishment of criteria for admission to partnership.

f. Recommendations of termination of associates.

*2. ***Establishment of criteria for advancement in partnership***

*3. ***Lawyer assignment to areas of practice***

*4. ***Formulation of compensation policies for legal and paralegal personnel***

5. *Development of information with respect to work load of lawyers*

   a. Current

   b. Anticipated

   c. Trends in practice

*6. *Establishment of number of lawyers to be hired*

*7. *Equal employment practice policies pertaining to legal and paralegal personnel*

8. *Hiring*

   a. Criteria for job offer.

   b. Recruiting Committee procedures.

   *c. Policies regarding employment of experienced lawyers.

*9. *Policies to lawyer perquisites*

   a. Reimbursement of expenses

   b. Seminars and continuing education

   c. Routine vacation policies

*10. *Definition of area of practice for departmental administrative purposes*

11. *Summer associate orientation*

   a. Accommodations

   b. Practice assignments

   c. Social

12. ***Associate orientation***

   a. Practice

   b. Social

13. *Development of information with respect to profitability by areas of practice*

14. *Coordination of departmental administrative meetings, policies and procedures*

15. *Lawyer social functions*

16. *Annual partner physical*

B. *The Finance Administrative Partner.* The Finance Administrative Partner shall have overall responsibility for the financial health of the firm, its record keeping, billing and reporting procedures, including the following specifics (asterisked matters to be approved by the Executive Committee prior to action thereon):

*1. *Recommendations as to partner capital contribution*

2. *Procedures for borrowing funds*

3. *Projections of income, expenses, cash flow and value of participating units, both annually and over extended periods of time*

4. *Depreciation policies*

5. *Procedures for daily report and monthly financial reports*

   a. Forms

   b. Frequency

*6. ***Preparation of annual firm budget (ranging from major firm operations to such specifics as continuing education, recruiting, etc.)***

7. *Formulation of billing procedures*
   a. Frequency
   b. Coordination of fee statement format
   c. Billing of internal expenses
   d. Billing for disbursements
*8. *Establishment of billing rates of legal, paralegal and non-legal personnel*
9. *Expense management and controls*
10. *Formulation of statistical analyses requested by other administrative partners or the Executive Committee*
11. *Insurance*
   a. Fire and casualty
   b. Errors and omissions
   c. Liability
   d. Hospitalization and major medical
12. *Preparation of firm tax returns*
13. *Timekeeping*
14. *Pension and retirement plans*
15. ***Formulation of a firm contingency plan for economic depression***

C. ***The Office Administrative Partner.*** **The Office Administrative Partner shall have complete responsibility for hiring, orienting, paying, training, evaluating, assigning and terminating all firm non-legal personnel, including the following specific responsibilities (asterisked matters**

to be approved by the Executive Committee prior to action thereon):

1. *Non-legal personnel compensation*
2. *Non-legal prerequisites*
   a. Vacation policies
   b. Fringe benefits
   c. Seminars and continuing education
*3. *Equal employment practice policies for all non-legal personnel*
4. *Recruitment and training of all non-legal personnel*
5. *Procedures for evaluation of non-legal personnel*
6. *Termination of non-legal personnel*
7. *Assignment of non-legal personnel*
8. *Preparation and dissemination of firm policies with respect to all non-legal personnel*
9. *Determination of managerial structure and assignment of responsibilities of non-legal personnel*
   a. Office Manager-Administrator
   b. Bookkeeper-Controller
   c. Secretarial Supervisor
   d. Switchboard—receptionists
   e. Data processing—time records
   f. Messenger—supplies—mail clerks

g. Duplicating—printing

h. File room—record center

i. Building personnel coordination

j. Librarian

*10. *Determination of firm holidays*

*11. *Projection of space needs*

*12. *Assignment of all offices for all firm personnel*

13. *Office Equipment and systems*

14. *Furnishings and art*

15. *Library*

a. Books

b. Legal memos

c. Opinion letters

d. Disposal procedures

e. Circulation lists

In carrying out his duties with respect to non-legal personnel, the Office Administrative Partner shall discuss actions with respect to individual personnel with such partners or associates as he may deem appropriate (including always lawyers for whom such personnel work directly) and shall be responsible for uniform firm policies with respect to the conduct of all non-legal personnel.

D. ***The Client Administrative Partner.*** **The Client Administrative Partner shall have overall responsibility for the firm's obtaining, housing, servicing, billing and**

terminating clients. He shall be responsible for the firm's awareness of potential new clients and the ethical attraction of those which may be desirable to the firm. He will be responsible for the policies pertaining to entertainment of clients by lawyers, billing procedures, conflicts of interest between clients and, where necessary, termination of clients, including the following specifics (asterisked matters to be approved by the Executive Committee prior to action thereon):

*1. *Fee review procedures and policies*

*2. *Entertainment policies*

a. Partnership entertainment

b. Expense reimbursement for lawyer entertainment

*3. *Directorships*

4. *Lawyer referrals*

a. Lists of lawyers for referrals

b. Contacts with lawyers referring matters to the firm

*5. *Establishment of line of succession of partners responsible for specific clients*

6. *Conflicts of interest between clients*

7. *New client opportunities*

8. *Criteria for acceptance of new clients*

*9. *New areas of practice and criteria for establishment*

*10. *Client account write-offs*

11. *Client lists*
    a. Maintenance of alphabetized list of all clients
    b. Publication of new clients of firm
12. *Development of client profitability statistics*
*13. *Political and civic responsibilities and coordination of lawyer involvement*
14. *Maintenance and publication of lawyer outside involvement in political, civic and bar affairs*
*15. *Policies with respect to lawyer insider—opportunities for investments with or in clients*
*16. *Recommendations as to establishment of branch offices*

The Client Administrative Partner will work closely with the other administrative partners and keep them advised of client attitudes with respect to procedures in their respective departments. The Client Administrative Partner shall be attuned to the image of the firm in the eyes of its clients, the impact of the policies of the firm in the eyes of its clients, and in general, the entire public relations of the firm.

January 9, 1975

MEMORANDUM TO: All Firm Personnel

The partners of the firm at year-end voted to expand the firm's Executive Committee from three to five members and then elected Messrs. Gowen, Spalding, J. Sibley, Hale and Attridge as the Executive Committee.

The Executive Committee, in turn, has appointed four Administrative Partners to perform certain specific

duties proposed by the 1974 Study Committee. The Administrative Partners are as follows:

Lawyer Administrative Partner — James M. Sibley

Finance Administrative Partner — Harry C. Howard

Office Administrative Partner — Richard A. Denny, Jr.

Client Administrative Partner — Bradley Hale

The functions of the Administrative Partners will be more clearly described to you in subsequent communications by the administrators themselves or by lawyers to whom they delegate some of their responsibilities. Generally speaking, however, the Lawyer Administrative Partner will have the overall responsibility for employment and supervision of all legal and paralegal personnel. The Finance Administrative Partner will have responsibility for the firm's financial health, its record keeping, billing and reporting procedures. The Office Administrative Partner will have responsibility for all non-legal personnel and the physical aspects of the firm. The Client Administrative Partner will be responsible for the firm's policies pertaining to its clients.

We ask your cooperation in assisting the Administrative Partners and their designees with their work over the coming year. Any questions or suggestions which you may have regarding the firm's operations should be directed to the Executive Committee or the appropriate Administrative Partner.

/s/ Hughes Spalding, Jr.
For the Committee

HSJr:sh

KING & SPALDING'S ANSWERS AND OBJECTIONS TO CERTAIN OF PLAINTIFF'S FIRST INTERROGATORIES

NOW COMES KING & SPALDING, a partnership named as defendant in this action, and, pursuant to Rule 33 of the Federal Rules of Civil Procedure, makes and files these Answers and Objections to Interrogatories Numbered 1, 5, 6, 7, 8, 10, 12, 13 and 14 of plaintiff's First Interrogatories. Pursuant to Order of the Court and agreement of counsel, the remainder of plaintiff's First Interrogatories need not be answered at this time, and this defendant hereby objects to each and every one of such remaining interrogatories on the ground that they exceed the proper limits of discovery as defined by the Court in this action.

GENERAL OBJECTIONS

1.

This defendant objects to plaintiff's First Interrogatories to the extent that they seek information regarding any period of time other than the "Time Period" as defined in paragraph 3 of the Interrogatories on the ground that information regarding any other time is not related to the subject matter of the pending action and is not reasonably calculated to lead to the discovery of admissible evidence and on the further ground that the burden on this defendant to respond to interrogatories with regard to any other time far exceeds the value to plaintiff of the information sought.

2.

This defendant objects to plaintiff's First Interrogatories to the extent that they request this defendant to

"identify" documents on the grounds that said request is unduly burdensome and repetitious in light of plaintiff's Request for Production of Documents, which was filed contemporaneously with plaintiff's First Interrogatories and seeks the production of all documents identified in King & Spalding's responses to those interrogatories.

3.

This defendant objects to plaintiff's First Interrogatories to the extent that they seek the identification or disclosure of any communication or document protected from discovery by the attorney work-product doctrine or the attorney-client privilege.

RESPONSE TO INDIVIDUAL INTERROGATORIES

1.

Interrogatory No. 1.(a)-(b)

Please provide the following information with respect to the defendant:

(a) When was the defendant founded and by whom?

(b) If the defendant is the successor to any previous law firms, please provide the following information with reference to each such antecedent law firm:

(1) The name(s) of each antecedent law firm.

(2) The dates of existence of each such antecedent law firm.

(3) The names of the partners of each such antecedent law firm.

Response to No. 1.(a)-(b)

(a)-(b) This defendant objects to subparts (a) and (b) of Interrogatory No. 1 on the grounds set forth in General Objection No. 1 above, which General Objection is incorporated herein by reference. Subject to and without waiving this objection, this defendant states that on January 1, 1885, Alex C. King and Jack J. Spalding formed a partnership for the general practice of law. The partnership of King & Spalding as presently constituted is the successor to the partnership formed by Messrs. King and Spalding in 1885. From 1885 until the present, the firm has existed under the following names:

January 1, 1885 - January 1, 1887—King & Spalding

January 1, 1887 - 1894—Calhoun, King & Spalding

1894-1903—King & Spalding

1903-1908—King, Spalding & Little

1909-1920—King, Spalding & Underwood

1920-1933—Spalding, MacDougald & Sibley

1934—Spalding, MacDougald, Sibley & Brock

1935-1943—Spalding, Sibley, Troutman & Brock

1943-1946—Spalding, Sibley & Troutman

1946-1956—Spalding, Sibley & Kelley

1956-1962—Spalding, Sibley, Troutman, Meadow & Smith

1962-Present—King & Spalding

Interrogatory 1(c)

(c) (1) Has the defendant or any partner thereof prepared any document which describes or summarizes the history of the defendant?

(2) If so, please identify each such document.

Response to Interrogatory 1(c)

(c) This defendant objects to subpart (c) of Interrogatory No. 1 on the grounds set forth in General Objection No. 1, which General Objection is incorporated herein by reference. Subject to and without waiving this objection, this defendant states that neither the defendant nor any partner thereof has prepared any document which describes or summarizes the history of the defendant during the Time Period as defined in plaintiff's Interrogatories.

Interrogatory 1(d)

(d) (1) When did defendant revert to the name "King & Spalding"?

(2) Please identify all documents which refer to the reasons that defendant decided to use the name "King & Spalding."

(3) To the extent the reasons for the defendant's reverting to the name "King & Spalding" are not fully stated in the document, identification of which is requested in subparagraph (2) above, please state such reasons.

Response to Interrogatory 1(d)

(d) This defendant objects to subpart (d) of Interrogatory No. 1 for the reasons set forth in General Objection No. 1, which General Objection is incorporated herein by reference. Subject to and without waiving this objection, this defendant states:

(1) A law firm known by the name of King & Spalding has existed at several times as reflected in the answer to subparts (a)-(b) above. This defendant adopted the name of King & Spalding in 1962.

(2) None.

(3) The firm had, in 1962, and still has, a practice of inviting established lawyers from outside of the firm to join the partnership. The decision to adopt the name King & Spalding was made to avoid the possibility of changing the name of the firm to reflect or conform with the addition or withdrawal of established lawyers from the partnership.

Interrogatory 1(e)

(e) (1) Did the defendant have a written partnership agreement during any of the Time Period?

(2) If the above is "yes," please identify the partnership agreement and all amendments thereto.

Response to Interrogatory 1(e)

(e) (1) At various times during the Time Period, the firm has had a written partnership agreement in effect. At other times within the Time Period, there was no written agreement in effect, due generally to the fact that a new agreement was not immediately prepared or executed upon a change in the membership of the partnership.

(2) This defendant will produce a copy of the partnership agreements and all amendments thereto in effect during the Time Period.

Interrogatory 1(f)

(f) (1) Were there any portions of the partnership agreement of defendant in effect during the Time Period

which are not fully set forth in the written partnership agreements referred to in subparagraph (e) above?

(2) If the answer is "yes," please state the full terms of the portions of the partnership agreement that were not in writing, and the time periods during which such unwritten portions of the partnership agreements were in effect.

Response to Interrogatory 1(f)

(f) (1) See Response to Interrogatory 1(e) (1) above.

(2) Not applicable.

Interrogatory 1(g)

(g) (1) Does the defendant have a partner's manual or other written compilation of its internal policies and procedures?

(2) If so, please (A) identify each such manual or compilation, (B) state how long such manual or compilation of the defendant has been in effect, and (C) describe generally the contents of each such manual.

Response to Interrogatory 1(g)

(g) This defendant objects to subpart (g) of Interrogatory No. 1 for the reasons set forth in General Objection No. 1, which General Objection is incorporated herein by reference. Subject to and without waiving this objection, this defendant states:

(1) No.

(2) Not applicable.

Interrogatory 1(h)

(h) Please (1) describe the organizational structure of defendant during the Time Period, and (2) identify all committees, departments and administrative positions of the defendant, and state with respect to each such committee, department or administrative position:

(A) Its name.

(B) Identify all documents that set forth the duties and responsibilities of each such committee, department, or administrative position, or, if such duties are not fully set forth in written form, state the duties and responsibilities of each.

(C) The names of the members of each such committee or department, or the holder of any administrative position, during each year since January 1, 1972.

(D) Identify by categories the records maintained by each such committee, department or administrative position.

Response to Interrogatory 1(h)

(h) This defendant objects to subpart (h) of Interrogatory No. 1 on the ground that the request to describe "the organizational structure" of this defendant is unduly vague and not subject to a reasonable interpretation and upon the further ground that said request is unduly burdensome upon this defendant. Subject to and without waiving this objection, this defendant states that various committees or administrative positions existed within the firm for part or all of the Time Period. As a preface to the description of these committees or positions, this defendant states that the primary duty of every lawyer at

King & Spalding, whether partner or associate, is the practice of law. The administrative positions described below constitute collateral administrative duties which are performed by various partners at various times, but these duties are at all times secondary to the practice of law. Further, all of these committees or administrative positions are ultimately accountable to the partnership as a whole, which retains the ultimate decision-making power on all substantial questions involving policies of operating the firm. See §§ 7, 14 of Partnership Agreement.

(1) (A) The Management Committee

(B) The duties and responsibilities of the Management Committee are defined in the Partnership Agreement. The Management Committee in its present form (originally called the Executive Committee) was formed by the partnership in 1974.

(C) King & Spalding objects to this subpart to the extent that it seeks the identification of members of the Management Committee of King & Spalding at any time other than May, 1978 or May, 1979, in that such information is not related to the subject matter of plaintiff's action and is not reasonably calculated to lead to the discovery of admissible evidence with regard to this action. Subject to and without waiving this objection, this defendant states that, as of May, 1978, the Management Committee of King & Spalding was comprised of the following individuals: Hughes Spalding, Jr., James M. Sibley, Byron Attridge, Robert L. Steed, and Harry C. Howard. As of May, 1979, the Management Committee was comprised of the following individuals: James M. Sibley, Byron Attridge, Robert L. Steed, Harry C. Howard, Robert W. Hurst.

(D) Minutes of the meetings of the Management Committee exist for the period from 1972 to the present.

(2) (A) Lawyer Administrative Partner

(1) (B) During the Time Period, the Lawyer Administrative Partner had overall responsibility for recruitment, employment, assignment, evaluation and supervision of all legal and paralegal personnel, with the mandate to insure that professional obligations are carried out on all client matters with quality, service and timely performance and with a view toward the harmony of working conditions for legal and paralegal personnel. The Lawyer Administrative Partner serves as the person to whom any lawyer in the firm may express any opinion or view which he wishes to communicate to the partnership. The Lawyer Administrative Partner also has such other duties as the Management Committee may define from time to time. (2) (B) These duties are outlined in a 1975 memorandum to all firm personnel from the Management Committee ("1975 Memorandum"). The duties outlined in the 1975 Memorandum have been modified and reassigned from time to time.

(C) James M. Sibley

(D) The Lawyer Administrative Partner maintains no such records with regard to this administrative position.

In addition to the two specific positions discussed above, this defendant has during the Time Period, as outlined in the 1975 Memorandum, also had Finance, Office, and Client Administrative Partners, as well as a Hiring

Committee, a Fee and Client Committee, a Secret Art Committee, an Associate Orientation Committee, an Associate Partner, a Paralegal Administrative Partner, and various other positions or committees at various times. The committees and administrative positions are appointed by the partnership or the Management Committee on an ad hoc basis and perform duties and responsibilities as assigned. This defendant objects to providing information in addition to that provided in the 1975 Memorandum for these committees or positions on the ground that said requests are overly broad and unduly burdensome.

For further answer, this defendant states that during the Time Period, it has been more or less divided for certain administrative purposes into the following departments: Corporate, Antitrust, Securities, Municipal Finance, Banking, Litigation, Real Estate and Tax. Matters are frequently handled by lawyers from more than one department, depending on the nature of the legal problem faced by the client. Moreover, lawyers initially assigned to one department frequently move to other departments. Plaintiff was, at all times during her employment with King & Spalding, assigned to the Real Estate Department. This defendant objects to identifying the Administrative Partners and attorneys assigned to various departments on the ground that said identification relates to the merits of this action, discovery on which has been stayed pending a ruling by the Court on this defendant's jurisdictional objections to plaintiff's claim.

Interrogatory 1(i)

(i) With respect to "Administrative Partner" positions of the defendant which existed at any time during the Time Period, state the following information:

(1) Identify the title of the position.

(2) (A) Identify all documents which set forth or define the duties and responsibilities of such position, and (B) if such duties and responsibilities are not fully set forth in written form, state the unwritten powers and duties of each such position.

(3) Identify each person holding such position during the Time Period.

(4) Identify by type or category and a general description of contents the records maintained by or under the supervision of the person in such position.

Response to Interrogatory 1(i)

(i) King & Spalding objects to subpart (i) of Interrogatory No. 1 to the extent that it seeks information with regard to the "Administrative Partner" positions other than what is described in the 1975 Memorandum and the responses to subpart (h) above on the grounds that such information is not related to the subject matter of the pending action and is not reasonably calculated to lead to the discovery of admissible evidence. With regard to the Lawyer Administrative Partner, see the responses to subpart (h) above.

Interrogatory 1(j)

(j) Does the defendant maintain minutes or other documents reflecting the substance of (1) general meetings of defendant's partners, (2) general meetings of defendant's partners and associates, (3) meetings of committees of the defendant, and (4) meetings of departments of the law firm, and, if so, for what period of time have such minutes or other documents been maintained?

Response to Interrogatory 1(j)

(j) This defendant objects to subpart (j) of Interrogatory No. 1 for the reasons set forth in General Objection No. 1, which General Objection is incorporated herein by reference. Subject to and without waiving this objection, this defendant maintains minutes or records of the meetings of the following committees for the period of time shown:

Management Committee (1972—Present; provided, however, that prior to 1977, such minutes were prepared and maintained on a sporadic basis).

Partnership Meetings (1972—Present). This defendant also maintains for certain periods of time minutes of the meetings of its Hiring Committee, but objects to the identification or production of those minutes on the ground that they are not related to the subject matter of the pending action and are not reasonably calculated to lead to the discovery of admissible evidence.

Interrogatory 1(k)

(k) Please identify all documents which refer to or reflect the following information pertaining to (1) the defendant's policy and procedure for determining capital or other financial contributions required by the defendant in connection with the admission of a new partner to the firm, (2) the percentage of ownership of the assets of the defendant acquired by a new partner, (3) the percentage or amount of firm capital or assets which a partner is entitled to receive as a matter of right from the firm upon voluntarily withdrawal, expulsion, or death.

Response to Interrogatory 1(k)

(k) This defendant objects to subpart (k) of Interrogatory No. 1 for the reasons set forth in General Objection No. 1, which General Objection is incorporated herein by reference. This defendant further objects to subpart (k) of Interrogatory No. 1 on the ground that the information sought therein is not related to the subject matter of the pending action and is not reasonably calculated to lead to the discovery of admissible evidence with regard to this action. Subject to and without waiving its objection, this defendant states that information of the nature sought in subpart (k) is included in the Partnership Agreement.

Interrogatory 1(l)

(l) Please (1) identify all documents which set forth the procedure, method, system or criteria used by the defendant or any committee thereof to determine the compensation of partners in defendant, and (2) if such procedure or method is not fully set forth in any documents, please state the procedure, method, system or criteria used by the defendant to determine the compensation of partners.

Response to Interrogatory 1(l)

(l) This defendant objects to subpart (l) of Interrogatory No. 1 on the grounds that the information requested therein is not related to the subject matter of the pending action and is not reasonably calculated to lead to the discovery of admissible evidence with regard to this action.

This defendant further objects to subpart (l) to the extent that it seeks information about procedures or cri-

teria used at any time other than the Time Period for the reasons set forth in General Objection No. 1, which General Objection is incorporated herein. Subject to and without waiving this objection, this defendant states:

(1) None other than the Partnership Agreement.

(2) The procedures for determining the compensation of partners within this defendant vary from year to year, but generally involve obtaining an agreement of the partnership as a whole, as provided by §§ 7, 14 of the Partnership Agreement.

Interrogatory 1(m)

(m) (1) Did the defendant maintain professional malpractice insurance during the Time Period?

(2) If so, please state the monetary limits of such policies applicable to errors, omissions or professional malpractice by (A) partners of defendant, (B) associates of defendant.

Response to Interrogatory 1(m)

(m) King & Spalding objects to subpart (m) of Interrogatory No. 1 on the grounds that said Interrogatory relates to a defense asserted by this defendant to plaintiff's claim and therefore is not properly within the scope of discovery as authorized by the Court's Order of April 15, 1980. King & Spalding further objects to Interrogatory 1(m) on the grounds that said Interrogatory relates to the merits of this action, discovery on which has been stayed pending a ruling by the Court on this defendant's jurisdictional objections to plaintiff's claim. Subject to and without waiving this objection, this defendant states:

(1) Yes.

(2) This defendant objects to subpart (2) of part (m) of Interrogatory No. 1 on the grounds that the information requested therein is not related to the subject matter of the pending action and is not reasonably calculated to lead to the discovery of admissible evidence with regard to this action.

Interrogatory 1(n)

(n) (1) Did the defendant have any pension, profit sharing or retirement plan in effect during the Time Period that covered both partners and associates; if so (2) please identify each such plan and any amendments thereto.

Response to Interrogatory 1(n)

(n) (1) Yes, a retirement plan.

(2) This defendant objects to subpart (2) of part (n) of Interrogatory No. 1 on the grounds that the information requested therein is not related to the subject matter of the pending action and is not reasonably calculated to lead to the discovery of admissible evidence with regard thereto.

5.

Interrogatory 5

Please identify all documents which state, in whole or in part, the standards, criteria, procedures or policies utilized by defendant during the Time Period concerning the following subjects:

(a) Evaluation of Associate Performance, including but not restricted to (1) criteria for evaluation of associ-

ates, (2) coordination of evaluation by partners, (3) communication to partners and to associates individually the results of associate evaluations, (4) criteria for admission to partnership, and (5) decisions or recommendations of termination of associates.

(b) Criteria for advancement to partnership.

(c) Compensation policies for legal personnel.

(d) Establishment of number of lawyers to be hired or admited to partnership.

(e) Equal employment practice policies pertaining to legal personnel.

(f) Hiring, including but not limited to (1) criteria for job offer, (2) Recruiting Committee procedures, (b) policies regarding employment of lawyers.

Response to Interrogatory 5

King & Spalding objects to Interrogatory No. 5 on the grounds that said Interrogatory relates to a defense asserted by this defendant to plaintiff's claim and therefore is not is not properly within the scope of discovery as authorized by the Courts Order of April 15, 1980. King & Spalding further objects to Interrogatory No. 5 on the grounds that said Interrogatory relates to the merits of this action, discovery on which has been stayed pending a ruling by the Court on this defendant's jurisdictional objections to plaintiff's claim.

6.

Interrogatory 6

With reference to the Fifth Defense stated in the answer that "[p]laintiff's claims under Title VII are barred

because defendant is not a person engaged in an industry affecting commerce within the meaning of Title VII," please state the following information:

(a) Please state all facts on which defendant relies to support such contention.

(b) Please identify all documents on which defendant relies to support such contention.

(c) Please identify all persons who are known to defendant or to defendant's attorneys to have personal knowledge of such facts.

Response to Interrogatory 6

This defendant objects to Interrogatory No. 6 on the grounds that said Interrogatory seeks information regarding a defense to plaintiff's claim of employment discrimination and, therefore, is beyond the scope of discovery authorized by the Court in its ruling on April 15, 1980.

7.

Interrogatory 7

With reference to the allegations of paragraph 2(a) of the Eighth Defense of the answer that "defendant denies that it is a person engaged in an industry affecting commerce," please state the following information:

(a) Please state all facts on which defendant relies to support such contention.

(b) Please identify all documents on which defendant relies to support such contention.

(c) Please identify all persons who are known to defendant or to defendant's attorneys to have personal knowledge of such facts.

Response to Interrogatory 7

This defendant objects to Interrogatory No. 7 on the grounds that said Interrogatory seeks information regarding a defense to plaintiff's claim of employment discrimination and, therefore, is beyond the scope of discovery authorized by the Court in its ruling on April 15, 1980.

8.

Interrogatory 8(a)

(a) Does defendant contend that it is not engaged in interstate commerce?

Response to Interrogatory 8(a)

(a) This defendant contends that it is not engaged in interstate commerce within the meaning of Title VII, which refers to a "person engaged in an industry affecting commerce," in that this defendant is engaged in a profession, not an industry. This defendant states, however, that it derives a substantial portion of its total fees from clients who reside or have their principal place of business outside of the State of Georgia and will further stipulate that, in performing legal services for these clients and for its clients within the State of Georgia, lawyers who are members of or are employed by this defendant make numerous trips to points outside of Georgia. This defendant further states that these trips are made in association with, *inter alia,* rendering legal services in court or administrative proceedings located outside of Georgia, rendering legal services with reference to real estate transactions involving real property outside of the State of Georgia, rendering legal services in connection with the sale of securities by an issuer having its principal place

of business outside of the State of Georgia, and rendering other legal services to clients whose principal offices are located outside the State of Georgia.

Interrogatory 8(b)

(b) If so, please state the following information with respect to defendant's last complete fiscal year:

(1) The total fees received by the defendant for the rendition of legal services and the amount of fees billed by defendant's (A) Atlanta office and (B) defendant's Washington office.

(2) The total revenues of the defendant derived from legal services rendered to clients with respect to litigation pending in Georgia, real estate transactions involving real property located exclusively in Georgia, bond or other securities, offerings for offerors located exclusively in Georgia where all the purchasers located within Georgia.

(3) The total revenues derived by defendant from the following:

(A) The rendition of legal services with reference to any court or administrative proceedings located outside Georgia.

(B) The rendition of legal services with reference to any real estate transactions involving property outside the State of Georgia.

(C) The rendition of legal services in connection with any offering or sale of securities by an issuer having its principal place of business outside the State of Georgia, or which required

registration, or exemption under the laws of a state other than Georgia, or which was closed outside the State of Georgia.

(D) The rendition of any other legal services to clients whose principal offices were located outside the State of Georgia, and which involved the application of procedural or substantive law of a state other than Georgia.

(4) (A) The number of trips made by lawyers of defendant to points outside of Georgia in the course of rendering professional services for clients, (B) the number of days spent by lawyers of defendant outside the State of Georgia in the course of rendering professional services for clients, and (C) the cost of such trips to the defendant or its clients.

(5) (A) The number and (B) cost of long distance telephone charges incurred by defendant in the couse of rendering professional services for clients.

Response to Interrogatory 8(b)

(b) King & Spalding objects to subpart (b) of Interrogatory No. 8 on the grounds that, in light of the facts stated in its response to subpart (a) above, the specific information requested in subpart (b) is overly broad and unduly burdensome to this defendant.

10.

Interrogatory 10

With reference to the allegations of Paragraph 9 of the Eighth Defense that defendant had a "practice of not employing permanent associates," please state the following information:

(a) When and how was this policy adopted?

(b) Is this policy reflected by any documents, and, if so, please identify all such documents?

(c) (1) Has the defendant made any exceptions to the policy since its adoption? If so, (2) please describe each individual for whom an exception was made, (3) the reasons for the exception, and (4) identify all documents reflecting such reasons.

(d) (i) Under defendant's policy, does an associate have the alternative of remaining as an employee of the firm? If so, please state (2) the length of time that the associate is permitted to remain an employee of the firm, and (3) any changes or modifications in the compensation, terms and conditions of employment that would apply to an associate who has been denied partnership that would not be applied to other associates who have been refused admission to partnership.

Response to Interrogatory 10

King & Spalding objects to Interrogatory No. 10 on the grounds that said Interrogatory relates to a defense asserted by this defendant to plaintiff's claim and therefore is not properly within the scope of discovery as authorized by the Court's Order of April 15, 1980. King & Spalding further objects to Interrogatory No. 10 on the grounds that said Interrogatory relates to the merits of this action, discovery on which has been stayed pending a ruling by the Court on this defendant's jurisdictional objections to plaintiff's claim.

Interrogatory 12(a)

(a) Has the defendant given any consideration to the applicability of Title VII of the Civil Rights Act to

(1) defendant's practices, policies, procedures or decisions to employ, refrain from employing, discriminate in the employment of, or terminate the employment of lawyers as associates in defendant, and (2) defendant's decision to make, refrain from making, or delay making or "inviting" an associate to become a partner in defendant, other than in specific connection with the charge filed by plaintiff with the EEOC, and the pending suit filed by plaintiff?

Response to Interrogatory 12(a)

(a) This defendant objects to the term "consideration" and the phrase "given any consideration" as used in Interrogatory No. 12 on the grounds that said terms are unduly vague and not subject to reasonable interpretation within the context of a law firm partnership. This defendant further objects to Interrogatory 12(a) on the grounds that said Interrogatory relates to a defense asserted by this defendant to plaintiff's claim and therefore is not properly within the scope of discovery as authorized by the Court's Order of April 15, 1980. This defendant further objects to Interrogatory 12(a) on the grounds that said Interrogatory relates to the merits of this action, discovery on which has been stayed pending a ruling by the Court on this defendant's jurisdictional objects to plaintiff's claim. This defendant further objects to Interrogatory 12(a) for the reasons set forth in General Objection No. 1, which General Objection is incorporated herein. Subject to and without waiving its objections, this defendant states as follows:

(1) Yes.

(2) No.

Interrogatory 12(b)

(b) If the answer to subparagraph (a) is "yes," identify all documents which refer to, reflect or evidence defendant's consideration of any of the subjects described in subparagraph (a).

Response to Interrogatory 12(b)

(b) See this defendant's objection to subpart (a) above, which objection is incorporated herein by reference. Subject to and without waiving its objection, this defendant states that it knows of no such documents.

13.

Interrogatory 13

(a) Has defendant employed any outside consultant to make any evaluation or recommendation with respect to the organizational structure of the defendant?

(b) If so, please identify such consultant and identify any report or recommendations made by such consultant.

Response to Interrogatory 13

(a) No.

(b) Not applicable.

14.

Interrogatory 14

Please identify the partners or employees of defendant who are primarily responsible for (a) collecting the

information contained in the answers to these interrogatories, and (b) locating the documents identification of which is requested in these interrogatories.

Response to Interrogatory 14

(a) Byron Attridge.

(b) Byron Attridge.

SIGNED AS TO OBJECTIONS ONLY

LOKEY & BOWDEN

/s/ Hamilton Lokey
/s/ Gerald F. Handley

Attorneys for Defendant
KING & SPALDING

VERIFICATION

STATE OF GEORGIA
COUNTY OF FULTON

BYRON ATTRIDGE, being duly sworn on oath, deposes and says as follows:

"I am BYRON ATTRIDGE, a partner of defendant, King & Spalding, and in that capacity have read the foregoing Answers to Interrogatories of King & Spalding. The information in said Answers has been obtained by me from investigations conducted by myself and by counsel for King & Spalding. On the basis of those investigations, and to the best of my present information and belief, the matters set forth in said Answers are true."

/s/ Byron Attridge

REPLY MEMORANDUM BY EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN SUPPORT OF MOTION TO PARTICIPATE AS *AMICUS CURIAE*.

King and Spalding, in its opposition to the Commission's motion to participate as *amicus curiae*, makes a number of erroneous factual assumptions which the Commission wishes to dispel.

1. King and Spalding's contention that the Commission's inability to investigate and conciliate Ms. Hishon's charge fully should now preclude Commission participation as *amicus curiae* misconstrues the nature of the Commission's actions.

The EEOC's Atlanta district office issued its early notice of right to sue at Ms. Hishon's request pursuant to a judicially sanctioned Commission regulation.[1] That regulation authorizes district directors to issue notices of right to sue upon request if it appears that, because of the backlog of charges in the district office, the office will be unable to complete processing the charge within 180 days. Inasmuch as Ms. Hishon had an absolute right to demand a right to sue notice on the 180th day, the purpose of the regulation is solely to avoid needless delay

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[1]The regulation, 29 C. F. R. 1601.28(a)(2) (1978), has been upheld by the only appellate decision on point, *Bryant v. California Brewers Ass'n*, 585 F. 2d 421 (9th Cir. 1978), *vacated and remanded on other grounds*, — U. S. —, — S. Ct. —, 63 L. Ed. 2d 55 (1980), in accordance with prevailing decisional law. *See, e. g., Milner v. National School of Health Technology*, 409 F. Supp. 1389 (E. D. Pa. 1976); *Westerlund v. Fireman's Fund Ins. Co.*, — F. Supp. —, 11 FEP Cases 744, 745, 10 EPD ¶10,456, at 5974 (N. D. Cal. 1975).

when it appears that Commission processing would not be finished by the time Ms. Hishon could have exercised her statutory prerogative no matter what the Commission was doing.

Furthermore, King & Spalding's suggestion that the EEOC's inability to process expeditiously Ms. Hishon's charge makes Commission *amicus curiae* participation inappropriate is illogical. Administrative processing of a charge is a time-consuming fact-finding process, requiring the interviewing of witnesses and examination of numerous documents, to determine whether charging parties in facts suffered discrimination. In contrast, our proposed participation involves legal analysis of facts gathered by others to determine whether Title VII applies to the law firm's partnership decisions. These are wholly distinguishable Commission functions which serve entirely different purposes. In addition, district office backlogs have no bearing on the General Counsel's ability to make the Commission's view of the law known to courts in individual cases. The Commission has a duty to investigate all charges unless a right-to-sue notice is issued at the aggrieved person's request. As a matter of fairness, it processes charges in the order in which they are received. By contrast, the General Counsel can pick and choose among cases presenting important legal issues, irrespective of the order in which litigation was brought.

2. King and Spalding's contention that the Commission seeks to enter this action "as a partisan on behalf of the plaintiff" misidentifies the purpose of *amicus curiae* participation. The EEOC has a statutory duty to enforce Title VII and to insure that its coverage includes all whom Congress intended to protect. We are

seeking to fulfill that responsibility here. The mere fact that, in arguing for Title VII coverage for "junior" partners, the Commission also assists Ms. Hishon in withstanding a motion to dismiss scarcely makes EEOC participation "partisan".

3. King and Spalding's allegation that the Commission does not need access to discovery materials for the purpose of arguing that the firm's actions are covered by Title VII is erroneous. The only reported decision on this issue, *Lucido v. Cravath, Swaine & Moore,* 425 F. Supp. 123 (S. D. N. Y. 1979), resolved the question on the basis of facts adduced through discovery. The court cited plaintiff's reliance on the firm's stated policy—which consisted of fairly considering associates for partner, hiring partners exclusively from within the firm, and discharging associates passed over for partner—to find the opportunity for promotion one of the "terms, conditions, or privileges of employment" or an "employment opportunity" as to which Title VII prohibits discrimination, 42 U. S. C. 2000e - (2) (a) (1), (a) (2). *Id.* at 128. Hence, in order to argue this and other possible theories of liability, the Commission must have access to information regarding King and Spalding's structure and operations.

4. King and Spalding's concerns that the court's protective order may be breached should the Commission have access to discovery are unfounded. Until such time as the protective order is modified or vacated, only four Commission attorneys[2] and one or two secretaries will see

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[2]Leroy D. Clark, General Counsel; Joseph T. Eddins, Associate General Counsel; Lutz Alexander Prager, Susan Buckingham Reilly, Attorneys, Appellate Division.

our brief in this case; only two of the attorneys[3] will review discovery materials in order to prepare the brief. All four attorneys and support staff are located in Commission Headquarters within the Office of General Counsel.

For these reasons, the Commission submits that its motion for leave to participate as *amicus curiae* should be granted.

LEROY D. CLARK
General Counsel

JOSEPH T. EDDINS
Associate General Counsel

LUTZ ALEXANDER PRAGER
/s/ SUSAN B. REILLY
Attorneys

June 4, 1980

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

2401 E Street, N. W.
Washington, D. C. 20506
(202) 634-6150

MOTION TO COMPEL KING & SPALDING TO PRODUCE DOCUMENTS AND TO ANSWER INTERROGATORIES

Plaintiff respectfully moves the Court, pursuant to Rule 37(a) (2) of the Federal Rules of Civil Procedure and in conformity with Rule 91.61 of the Local Rules of this Court, for an order compelling defendant King &

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[3]Mr. Prager and Ms. Reilly.

Spalding to respond to the following of plaintiff's discovery requests which were served on April 10, 1980:

(1) Produce complete and unabridged copies of its written partnership agreements in effect during the period January 1, 1972 through the current date (see, for example, the censored version of Memorandum of Agreement executed January 1, 1974, attached to this motion);

(2) Produce documents called for by Plaintiff's First Notice to Produce to King & Spalding served April 10, 1980; and

(3) Answer Interrogatories numbered 1 (c), (1 (d) (l), 1 (f), 1 (h), 1 (i), 1 (j), 1 (k), 1 (l) and 1 (m), 5, 6, 7, 8 and 10 of Plaintiff's First Interrogatories to King & Spalding also served April 10, 1980.

The plaintiff's discovery requests, the defendant's objections thereto, and the grounds for compelling further answers are set forth below as required by Local Rule 91.61 in the brief filed in support of this motion in the brief filed in support of this motion.

WHEREFORE, plaintiff respectfully prays that her motion be granted and that defendant King & Spalding be ordered to file more responsive answers to plaintiff's First Interrogatories, and to produce documents requested by plaintiff's First Notice to Produce.

/s/ Emmet J. Bondurant
/s/ Jeffrey M. Smith

Attorneys for Plaintiff

Of Counsel:

TROTTER, BONDURANT, MILLER & HISHON

2200 First National Bank Tower
Atlanta, Georgia 30383
(404) 688-0350

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter with a copy of this pleading by depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage thereon.

This 21 day of June, 1980.
Emmet J. Bondurant, Attorney for Plaintiff.

ATTACHMENT

MEMORANDUM OF AGREEMENT
KING & SPALDING

The undersigned partners in the above-named firm hereby agree as follows:

1.

The firm name shall be:

"KING & SPALDING".

2.

This firm began business January 1, 1885 under the firm name of King & Spalding, and continued through the years as Calhoun, King & Spalding; King, Spalding & Little; King, Spalding & Underwood; King, Spalding, MacDougald & Sibley; Spalding, MacDougald & Sibley; Spalding, Sibley, Troutman & Brock; Spalding, Sibley & Troutman; Spalding, Sibley, Troutman & Kelly; Spalding, Sibley, Troutman, Meadow & Smith; and currently the present firm name.

3.

This firm shall engage in the general practice of law. Each partner, except William K. Meadow and any other partner whose participation shall have been reduced under paragraph 11 hereof, shall devote his full time and attention to the business of the firm. Any partner whose participation shall have been reduced under paragraph 11 hereof shall devote such time and attention to the business of the firm as is commensurate with such reduced participation.

4.

Each partner shall contribute to the capital that amount of money which is the result of multiplying by the amount of participating units set opposite the name of such partner in paragraph 6 hereof.

5.

a) The firm shall continue until dissolved by vote of partners with at least 66-⅔% of the participating units set forth in paragraph 6 hereof. The firm shall not be dissolved by the withdrawal, incapacity or death of any partner or partners, except as provided in subparagraph (c) hereof.

(b) Any partner may voluntarily withdraw from the firm at any time by written notice to one of the Managing Partners. Any partner shall withdraw from the firm if partners with at least 66-⅔% of the participating units shall in writing so request, and no cause for such request need exist or be shown.

(c) Upon the voluntary withdrawal of any partner or partners, or upon withdrawal of any partner or partners upon request pursuant to subparagraph (b) hereof, the remaining partners may elect to dissolve the firm. If

such election is made, written notice thereof signed by partners with at least 66-⅔% of the remaining participating units shall be delivered to the withdrawing partner or partners, and to any other partners who have not signed with notice, within 30 days after the effective date of such withdrawal. Such dissolution, if so elected, shall be deemed to have occurred on the effective date of such withdrawal.

6.

(a) Each partner's participation in the net profits and losses of the firm shall be determined by multiplying such profits and losses by a fraction, the numerator of which is the number of participating units set opposite the name of such partner below and the denominator of which is the sum of all participating units. The name of each partner and his participating units are:

Name of Partner	*Participating Units*
William K. Meadow	
Charles L. Gowen	
Hughes Spalding, Jr.	
James M. Sibley	
Charles H. Kirbo	
John Izard	
Pope B. McIntire	
Kirk M. McAlpin	
Kenneth L. Hewitt	
Richard A. Denny, Jr.	
Harry C. Howard	
William H. Izlar, Jr.	
R. Byron Attridge	
Bradley Hale	
Robert W. Hurst	
Robert L. Steed	
Henry Hall Ware, III	
Daniel J. O'Connor, Jr.	

Hugh Peterson, Jr.
John A. Wallace
Edward J. Hawie
John C. Staton, Jr.
David L. Coker
John D. Hopkins
A. Felton Jenkins, Jr.
G. Lemuel Hewes
Jack H. Watson, Jr.
Horace H. Sibley
Charles M. Shaffer, Jr.
Joseph R. Gladden, Jr.
W. Donald Knight, Jr.

Total

(b) When any partner has been separated from the firm by voluntary or involuntary withdrawal, death or incapacity, then such partner's participating units shall be eliminated from the calculations set forth in this paragraph.

7.

All substantial questions involving policies of operating the firm (*e. g.*, change in its name, participating units, etc.) shall be decided by the vote of partners with 60% or more of the participating units.

8.

(a) The partnership incurred indebtedness in the aggregate principal amount of during 1971 to pay for the cost of the leasehold improvements and the furniture and fixtures for its new offices. Such indebtedness is repayable in 37 approximately equal quarterly installments of principal and interest which commenced on April 1, 1971 and which extend through April 1, 1980. In order to provide a fund from which payments of prin-

cipal and interest on such loan can be made, there has been charged against the income of the firm since 1970 and there shall continue to be charged against the income of the firm, an amount equal to the sum of (i) the cost of such leasehold improvements amortized on a straight-line basis over ten years (which is the term of the firm's lease of such new offices), plus (ii) the cost of such furniture and fixtures depreciated on an accelerated basis over ten years, and (iii) the interest due currently on such indebtedness (hereinafter collectively called the "Deducted Amounts"). Cash equal to the Deducted Amounts shall be placed in a Reserve for Debt Service, and each partner shall have an interest in such Reserve equal to the portion of the Deducted Amounts that is charged against his interest in the partnership from time to time. The required payments of principal and interest on such indebtedness shall be the obligation of each partner to the extent of his interest in the profits of the partnership at the time of such payment, and shall be charged against and paid from his interest in the Reserve for Debt Service, to the extent thereof, and otherwise shall be paid from his share of the current profits of the firm. It is anticipated that for several years the Deducted Amounts will exceed the required payments of principal and interest on the indebtedness. Such excess shall be held in the Reserve for Debt Service and shall be invested by the Management Committee. All income earned from such investments in such Reserve shall be credited to the accounts of the partners in proportion to their respective interests therein at the end of each calendar year. Cash equal to the income earned from such investments during each calendar year shall at the end of each calendar year be transferred from the Reserve for Debt

Service to the general firm account. Upon payment in full of such indebtedness, any amount remaining in the Reserve for Debt Service shall be distributed among the partners according to their respective interests therein.

(b) Since the Reserve for Debt Service will result merely from the fact that deductions for depreciation, amortization and interest will not coincide with repayments of the indebtedness, upon separation from the firm of any partner by reason of voluntary or involuntary withdrawal, or death, the interest of such partner in the Reserve for Debt Service shall revert to the firm, to be held by it and applied against payments on such indebtedness as they become due. Neither such partner nor his personal representative shall have any interest therein or claim therefor, except that the amount of such interest shall be a credit against and reduction of the continuing liability of such partner for such inidebtedness, if any.

(c) William K. Meadow shall not have any liability for any part of the indebtedness incurred by the firm for the cost of its new offices following his separation from the firm by reason of voluntary or involuntary withdrawal, or death, or following dissolution of the firm, and the note and any loan agreement representing or with respect to such indebtedness shall expressly so state.

9.

(a) For some time it has been the practice to permit new partners to share immediately in all receipts of fees thereafter collected, even though they may have been earned in whole or in part at the time the new partner was admitted, and distributions to the partners, new and old alike, have been made upon a cash receipts basis with

no distinction between fees already collected and fees earned in whole or in part and uncollected prior to the admission of the new partner. In view of this practice by which the undersigned partners have benefited, it is agreed that upon the separation from the firm of any partner, whether by reason of voluntary or involuntary withdrawal or death, his interest in the firm's earnings and assets shall be as follows:

(i) A refund of his cash capital contribution, if the firm's capital is unimpaired (to the extent there is impairment of the firm's capital, such partner shall be refunded only his proportion of unimpaired capital);

(ii) The amount of undistributed net earnings to which he is entitled as shown by the firm's records as of the end of the month in which such withdrawal occurs.

Such amounts shall be paid as promptly as practical after such withdrawal.

(b) In addition, if such withdrawal is by reason of the death of a partner, a portion of the firm's future profits, in an amount equal to the percentage that such deceased partner's units of participation at date of death are of all units on such date, multiplied by the net income of the firm for the calendar year preceding the date of such partner's death, shall be paid in five equal annual installments, without interest, beginning on the first business day of the calendar year following the date of such partner's death.

(c) Amounts payable under subparagraph (a) hereof shall be paid to the withdrawn partner if living, or if

deceased to his widow, if any, or if none to his estate. Amounts payable under subparagraph (b) hereof shall be paid to the deceased partner's widow, if any, or if none to his estate. For federal income tax purposes, the widow, if any, or if none, his estate, shall be his successor in interest.

(d) Should any partner or partners be separated from the partnership by involuntary withdrawal or death, the partnership not being otherwise dissolved, such partner or partners' responsibility for the liabilities of the partnership, as between him or them, the partnership and the remaining partners, will terminate immediately and be assumed by the partners from time to time in the continuing partnership.

10.

Should any partner at any time become disabled, either wholly or partly, to continue in the full-time practice of law, an adjustment may be made in his participation units in future firm income to the extent determined by the other partners.

11.

(a) The following shall serve as an expression of intention of the partners of the firm as to the policy of reductions in participation by the partners upon reaching certain ages, except that it is not intended that such expression shall apply to William K. Meadow and Charles L. Gowen.

(b) Beginning with the first day of the month following the date of the partner's 67th birthday, his units shall be reduced to 75% of the units to which he was entitled on such birthday; beginning with the first day of

the month following such partner's 70th birthday, his units shall be reduced to 50% of the units to which he was entitled on his 67th birthday; beginning with the first day of the month following such partner's 73rd birthday, his units shall be reduced to 33-⅓% of the units to which he was entitled on his 67th birthday; and beginning with the first day of the month following such partners 77th birthday, his units shall be reduced to 25% of the units to which he was entitled on his 67th birthday.

(c) The provisions of such subparagraph (b) hereof to the contrary notwithstanding, should the total units of all partners whose participation has been so reduced following their 73rd birthday exceed 15% of the total units of all partners of the firm, such units of such partners who have reached their 73rd birthday shall be reduced proportionately so as to reduce the total of such units to 15% of the total units of all partners of the firm.

12.

Accurate and complete books of account shall be kept at all times at the expense of the firm. Each partner shall at all times have access thereto.

13.

It has been and is the agreement among the partners that each partner will provide and maintain an automobile needed for use in the partnership business in connection with those clients and matters for which the partner is responsible, and will pay such expenses as may be necessary for entertaining clients and prospective clients and otherwise maintaining and increasing partnership business, and that such expenses will not be reimbursed

by the firm. Such expenses are, however, required to be incurred by the partners and such expenses and the results obtained therefrom are taken into account in fixing the respective percentages of the participation of the partners in the net income of the partnership and are covered thereby.

14.

The management of the firm shall be delegated to a Management Committee comprised of three partners (the "Managing Partners"), namely, Charles L. Gowen, Hughes Spalding, Jr. and James M. Sibley. The Managing Partners shall select from among themselves one who shall be the Secretary of the Management Committee. The Secretary shall be primarily responsible for the proper functioning of the Management Committee. The Management Committee shall function for a period of one year terminating on December 31, 1974, and, after said date shall stand dissolved, unless continued in existence by the affirmative vote of partners with 66-⅔% or more of the participating units. To the Management Committee the partners delegate full and complete authority and responsibility to make any and all decisions, commitments and contracts with respect to the operation and management of the firm, provided, however, the Management Committee shall not have authority to act in a manner which would require a change in this Partnership Agreement for its accomplishment or implementation. The Management Committee shall have full authority to create from time to time such other committees as it might deem necessary or desirable in the proper conduct of the firm's business and to abolish any such committee so created. The Management Committee is authorized to delegate to any other committee which it might create such power

and authority as said Committee shall deem to be proper in the circumstances; provided, however, said Committee shall continue to stand responsible to the firm for any and all action taken by any committee which it shall create. No action taken by the Management Committee may be reversed or changed except by an affirmative vote of partners with 66-⅔% or more of the participating units.

15.

This Partnership Agreement may be amended from time to time by the vote of partners with 66-⅔% or more of the participating units.

16.

This agreement is effective as to all partners as of the first day of January, 1974.

Executed as this 1st day of January, 1974.

/s/ William K. Meadow
/s/ Hughes Spalding, Jr.
/s/ Charles H. Kirbo
/s/ Charles L. Gowen
/s/ James M. Sibley
/s/ John Izard
/s/ Pope B. McIntire
/s/ Kenneth L. Hewitt
/s/ Harry C. Howard
/s/ R. Byron Attridge
/s/ Robert W. Hurst
/s/ Henry Hall Ware, III
/s/ Hugh Peterson, Jr.
/s/ Edward J. Hawie
/s/ David L. Coker
/s/ A. Felton Jenkins, Jr.
/s/ Jack H. Watson, Jr.
/s/ Charles M. Shaffer, Jr.

/s/ Kirk M. McAlpin
/s/ Richard A. Denny, Jr.
/s/ William H. Izlar, Jr.
/s/ Bradley Hale
/s/ Robert L. Steed
/s/ Daniel J. O'Connor, Jr.
/s/ John A. Wallace
/s/ John C. Staton, Jr.
/s/ John D. Hopkins
/s/ G. Lemuel Hewes
/s/ Horace H. Sibley
/s/ Joseph R. Gladden, Jr.

/s/ W. Donald Knight, Jr.

BRIEF IN SUPPORT OF MOTION TO COMPEL KING & SPALDING TO ANSWER INTERROGATORIES AND TO PRODUCE DOCUMENTS

Introduction

This is a sex discrimination suit brought by the plaintiff, a woman lawyer formerly employed by King & Spalding as an associate, alleging that defendant King & Spalding unlawfully discriminated against her on the basis of sex when the Firm refused to promote her to partnership after seven years of employment as an associate, and then involuntarily terminated her employment as an associate of the Firm under the Firm's established "up or out policy."[1]

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[1]The existence of an "up or out policy" is admitted by King & Spalding in its Answer, in which the Firm alleges that it had a "practice of not employing permanent associates and knew that associates who had been advised that they would not be invited to become a partner should seek employment elsewhere." Answer ¶ 9 (p. 5). King & Spalding also emphasizes its "up or out policy" at least three times in its brief in support of its motion to dismiss the complaint:

> "After this decision was made, Mr. Denny was requested to advise plaintiff that consistent with the custom and practice of King & Spalding she was welcome to remain with the firm, *but only until she had had a reasonable time* to pursue other career opportunities." Brief p. 4.
>
> "King & Spalding does not employ permanent associates, and associates who are not admitted to partnership are expected, after a reasonable period of time, to find other employment." Brief p. 5.
>
> "Under the established policies of Defendant, there are no permanent associates. If an attorney is not admitted to the partnership, that attorney is expected, within a reasonable period of time, to find other employment." Brief p. 12.

See also Affidavit of James M. Sibley dated March 28, 1980, ¶ 10.

King & Spalding has moved to dismiss the complaint on the ground that, even if King & Spalding discriminated against plaintiff on the basis of her sex as alleged in the complaint, the Firm's decisions as to which of its many associates the Firm would retain by promoting them to partnership, and which it would force to leave as a consequence of the Firm's "up or out policy," do not involve a "term, condition or privilege of employment" that is covered by Title VII. § 703(a), 42 U. S. C. § 2000e-2(a).

The issue presented by this case is of major significance. A ruling in King & Spalding's favor on the "coverage" issue would be tantamount to an endorsement by the Court of the *right* of large institutional law firms to discriminate in the admission of lawyers to partnership on the basis of race, sex, or religion, without restraint or fear of legal redress. Such a ruling would permit, if not encourage, large law firms to adopt express written overt policies that say "No Blacks, Jews or Women Admitted to Partnership."

Such a ruling would be a major set-back for women and other minorities that, having won the right to attend law schools, and equal employment as untenured "associates," by law firms having 15 or more employees [*see Kohn v. Royall, Koegel & Wells,* 496 F. 2d 1094 (2d Cir. 1974); *Blank v. Sullivan & Cromwell,* 418 F. Supp. 1 (S. D. N. Y. 1975); *Rinella v. Rinella,* 401 F. Supp. 175 (N. D. Ill. 1975)], would find themselves confined to subservient or low-level positions in law firms, and denied an equal opportunity with their white male counterparts to advance to the more highly compensated and more prestigious partnership positions in the major law firms of the United States.

Such a ruling would run counter to the decisions of the Supreme Court and the Fifth Circuit that have emphasized that Title VII represents a national commitment to the elimination of discrimination from the economic life of the Country and is to be given the broadest possible interpretation and application given its important remedial purposes. *Franks v. Bowman Transportation Co., Inc.*, 424 U. S. 747, 763 (1976); *Rogers v. EEOC*, 454 F. 2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U. S. 957 (1972). A ruling exempting King & Spalding and other large institutional law firms from the coverage of Title VII would be inconsistent with rulings of the Supreme Court which have held that the coverage of national legislation regulating conditions of employment is to be interpreted liberally based on "economic fact," and is not to be narrowed by the application of artificial common law definitions of the term "employee." *NLRB v. Hearst Publications, Inc.*, 322 U. S. 111, 127 (1944).

In its Order of April 23, 1980, the Court recognized that an issue of this magnitude should not be decided on the bare-bones allegations of the complaint. Accordingly the Court granted the parties an opportunity to develop a complete record of evidence relevant to the Court's determination of the threshhold coverage issue during a 90-day discovery period.

Plaintiff served interrogatories and a document request on King & Spalding on April 10, 1980. The scope of these discovery requests was substantially narrowed by letter dated April 16, 1980 to conform the limitations on discovery approved by the Court orally at a conference in chambers on April 15 and confirmed by the Court's April 23, 1980 Order. After obtaining a two-week exten-

sion on May 27, 1980, King & Spalding filed responses to plaintiff's discovery requests. In its responses, King & Spalding effectively "stonewalled" plaintiff's discovery requests by objecting to most of plaintiff's interrogatories, and by a blanket refusal to produce *any* documents with the exception of abridged copies of the Firm's partnership agreements which Your Honor had stated, during the conference in chambers on April 15, would "of course" would have to be produced.

Summary of The Contentions

Plaintiff believes that a summary of the legal theories that will be advanced to support the contentions of the parties on the coverage issue would be helpful to the Court in assessing the relevancy of plaintiff's discovery requests.

The question presented here is whether the opportunity of an associate to be promoted to partnership in a large established institutional law firm such as King & Spalding is a "term, condition or privilege of employment" within the coverage of § 703(a) of Title VII, and protected from unlawful acts of discrimination. This question has been directly decided in only one case, *Lucido v. Cravath, Swain & Moore*, 425 F. 2d 123 (S. D. N. Y. 1977). *See also* Note: *Applicability of Federal Antidiscrimination Legislation to the Selection of A Partner*, 76 Mich. L. Rev. 282 (Dec. 1977). In that case, the Court denied a motion to dismiss a Title VII action brought by a former male associate of a large Wall Street law firm, Cravath, Swain & Moore, who alleged that he had been denied admission to partnership because he was an Italian-Catholic Although there have been several other Title VII cases against law firms, all of those cases have involved allegations of sex discrimination in the initial employment of associates.

Kohn v. Royall, Koegel & Wells, 496 F. 2d 1094 (2d Cir. 1974); *Blank v. Sullivan & Cromwell*, 418 F. Supp. 1 (S. D. N. Y.) 1975); *Rinella v. Rinella*, 401 F. Supp. 175 (N. D. Ill. 1975).

King & Spalding has moved to dismiss plaintiff's Title VII claims on the ground that a law firm's partnership decisions are not covered by the Civil Rights Act. Defendant contends that the opportunity of a lawyer to be promoted or advanced from the status of an "associate" to the status of a "partner" in a law firm is an "ownership" opportunity and not an "employment" opportunity covered by Title VII—that a King & Spalding partner is not an "employee" of the Firm—but a "joint employer" along with the Firm's 50+ other partners. King & Spalding's position is supported by only one case, *Burke v. Friedman*, 556 F. 2d 867 (7th Cir. 1977), which held that a small accounting firm with only four partners was not covered by Title VII when it refused to admit a fifth partner.

Without limiting the arguments that plaintiff will ultimately advance in opposition to King & Spalding's motion to dismiss plaintiff's Title VII claims, plaintiff will advance at least three basic legal theories in support of her position that Title VII applies to King & Spalding's discrimination against plaintiff on account of her sex. All of the discovery objected to by King & Spalding is directly relevant to one or more of these theories.

1.

For Title VII purposes, a large institutional law firm is to be treated in the same manner as other business entities are treated insofar as its obligations to promote qualified women to "management" positions are concerned.

It is plaintiff's basic contention that common law distinctions are not controlling Under Title VII and that a large institutional law firm has more attributes in common with large business corporations than it does with a small two-person common law partnership. King & Spalding should, therefore, be treated as an entity separate from its individual partners who should be treated as "employees" of the "Firm" for purposes of Title VII. Such an approach would conform to economic reality, and would treat large institutional law firms that are nominally organized as "partnerships" rather than "professional corporations" in the same manner as corporations and other large business entities are treated for purposes of Title VII.

The crux of King & Spalding's position is that the "Firm" and its partners are a single entity that cannot be separate for purposes of Title VII. There is, however, ample precedent for the proposition that a partnership will be treated as an entity that is separate and apart from its individual partners. For example, in *Bellis v. United States*, 417 U. S. 85, 93-94 (1974), the Supreme Court held a three-man law firm "partnership is properly regarded as an independent entity with a relative formal organization" [417 U. S. at 96 (n. 4)] that has "an established institutional identity independent of its individual partners" [417 U. S. at 96]; accordingly, the Court held that, even after the small law partnership had been dissolved, a former partner of the firm in the possession of partnership records had no individual right to invoke the privilege of self-incrimination in response to a subpoena to prevent production of records in his possession pertaining to the former partnership.

In language far more apropos of King & Spalding or any of the dozens of large, influential law firms throughout the country, than of the dissolved three-man partnership of Bellis, Kolsby & Wolf, the Court said:

> "Some of the most powerful private institutions in the Nation are conducted in partnership form. *Wall Street law firms* and stock brokerage firms provide significant examples. These are often *large, impersonal, highly structured enterprises* of essentially *perpetual duration.*"
>
> 417 U. S. at 93-94 (emphasis added).

King & Spalding meets all of these criteria.

In support of its ruling that a three-man law partnership is an independent entity, distinct from its partners, the Supreme Court emphasized many of the factors on which plaintiff relies as demonstrating that King & Spalding also has an "institutional identity independent of its individual partners" and, therefore, can be considered as the "employer" of its partners in the same way that a corporation is considered as the employer of its senior and junior executives. The Court explained that:

> "While small, the partnership here did have an *established institutional identity independent of its individual partners.* This was not an informal association or a temporary arrangement. . . . Rather, the partnership represented a formal institutional arrangement organized for the continuing conduct of the firm's legal practice. *The partnership was in existence for nearly 15 years* prior to its voluntary dissolution. Although it may not have had a formal constitution or bylaws to govern its internal affairs, state partnership law imposed on the firm a certain *organizational structure* in the absence of any contrary agreement by the partners; for example, it

guaranteed to each of the partners the equal right to participate in the management and control of the firm, Pa. Stat. Ann., Tit. 59, § 51 (e) (1964), and prescribed that majority rule governed the conduct of the firm's business, § 51 (h). *The firm* maintained a bank account in the partnership name, had stationery using the firm name on its letterhead, and, in general, *held itself out to third parties as an entity with an independent institutional identity.* It employed six persons in addition to its partners, including two other attorneys who practiced law on behalf of the firm, rather than as individuals on their own behalf. It *filed separate partnership returns for federal tax purposes,* as required by § 6031 of the Internal Revenue Code, 26 U. S. C. § 6031. *State law permitted the firm to be sued, . . . in the partnership name,* and generally regarded the partnership as a distinct entity for numerous other purposes."[2]

417 U. S. at 95-97 (emphasis added).

Unlike King & Spalding, the law firm in *Bellis* did not have a formal partnership agreement to serve as "a formal constitution or bylaws to govern its internal affairs." The Supreme Court emphasized in footnote (4) that "the *existence of a partnership agreement* [*such as King & Spalding has*] *would merely reinforce our conclusion that the partnership is properly regarded as an independent entity with a formal organization.*" 417 U. S. AT 96 (n. 4) (emphasis added).

The effect of the ruling in *Bellis* is to make clear that the form of the organization (partnership v. corporation) does not control over the substance in determining the scope or coverage of an important federal

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[2]Georgia law likewise recognizes the right of partnerships and other unincorporated associations to sue and be sued as an entity in partnership name. Ga. Code Ann. § 3-118.

mandate such as the Fifth Amendment in *Bellis,* or Title VII in this case, both of which require national standards of uniform application.

King & Spalding also argues that because partners are also considered to be the "owners" of the Firm, they cannot also be considered to be "employees" of the Firm for purposes of Title VII. Cases decided by the Supreme Court [*Goldberg v. Whitaker House Corp., Inc.,* 306 U. S. 28 (1961)], and by the Fifth Circuit [*Pettway v. American Cast Iron Pipe Co.,* 494 F. 2d 211, 264-66 (5th Cir. 1974), *rehearing denied,* 494 F. 2d 1296] establish, however, that owners of businesses may also be considered as "employees" who are protected by federal employment legislation. For example, in *Goldberg v. Whitaker House Corp., Inc., supra,* the Supreme Court held the women who worked at home knitting goods for sale by the cooperative were "employees" of the cooperative for purposes of the Fair Labor Standards Act, notwithstanding the fact that they were also "members" and "owners" of the cooperative. The Court concluded that "[t]here is no reason in logic why these members may not be employees. There is *nothing inherently inconsistent between the coexistence of a proprietary and an employment relationship.*" 366 U. S. at 28 (emphasis added).

In *Pettway v. American Cast Iron Pipe Co., supra,* the Fifth Circuit held that Title VII applies to and protects an opportunity to acquire an "ownership" position in a business on a fair and equal basis. In that case, all of the stock of American Cast Iron Pipe Co. had been conveyed under the will of the company's founder, John Egan, jointly to the members of two committees as trustees for the employees of the company. One committee

was called the Board of Management and consisted of corporate officers of the company. The second committee was called the Board of Operatives and consisted of white male employees of the company over 21 years of age elected by non-supervisory employees of the company. The district court held that, although black employees of the company were not "employees" of the Board of Operatives, the opportunity to be elected to serve on the Board of Operatives and to influence the management of the company by voting the shares of stock held by the Board was so connected with their employment that black employees could not be excluded from becoming trustee-owners of the stock as members of the Board of Operatives. *Pettway v. American Cast Iron Pipe Co.*, 333 F. Supp. 811, 815 (N. D. Ala. 1970). Judge Lynne held that:

> "[T]he right to serve as a member of the Board of Operatives at Acipco, has been, since the inception of the Egan Plan, a valuable term, condition or privilege of employment at Acipco and therefore falls within the express coverage of Title VII, 42 U. S. C. § 2000e-Z(a)."

On appeal, this portion of the district court's opinion was quoted with approval by the Fifth Circuit, which affirmed the ruling of the district court insofar as it held that black employees could not be denied election to the Board of Operatives. *Pettway v. American Cast Iron Pipe Co.*, 494 F. 2d 211, at pp. 263-264 (5th Cir. 1974), *rehearing denied*, 494 F. 2d 1296.

Thus, *Pettway* stands squarely for the proposition that where the opportunity to become an "owner" or "shareholder" and participate in the management of the enterprise is offered to some employees of the firm, it

is a "term, condition or privilege of employment" which cannot be discriminatorily withheld on the basis of race or sex.

Although King & Spalding has produced only *censored*[3] copies of its partnership agreements, those agreements reflect a conscious decision by King & Spalding to remove itself from the common law principles of partnership and create for King & Spalding a separate and continuing existence that closely resembles the organizational structure of ordinary business corporations:

1. *King & Spalding has a "charter."* While many law firms (including Kilpatrick & Cody and Trotter, Bondurant, Miller & Hishon) function as common law partnerships without written partnership agreements, King & Spalding has elected to adopt for itself a written partnership agreement which serves the same purposes that a corporate charter serves for a corporation. *See Bellis v. United States,* 417 U. S. 85, 96 (n. 4) (1974), in which the Supreme Court emphasized that the presence of a written partnership agreement would have reinforced its conclusion that a partnership has an independent identity that is separate from that of its partners.

2. *Continuing existence.* King & Spalding has elected to distinguish itself from a common law partnership by providing in the partnership agreement that the Firm, as an entity, has had a continuing existence since 1885, which is not affected by the admission of a new partner or the death, withdrawal or expulsion of any of its partners.

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[3]See page 40 below. Plaintiff has moved for the production of complete copies of the King & Spalding partnership agreements.

> "This firm began business January 1, 1885, under the firm name of King & Spalding . . . and currently the present firm name."
>
> Memorandum of Agreement effective as of January 1, 1978, ¶ 2.
>
> "(a) The firm shall continue until dissolved by vote of partners with at least 66-⅔% of the participating units. *The firm shall not be dissolved by the withdrawal, incapacity or death of any partner or partners, . . .*"
>
> Memorandum of Agreement effective as of January 1, 1978, ¶ 5(a).

In contrast, a common law partnership is dissolved automatically by the addition, withdrawal or death of one of its partners. Ga. Code Ann. § 75-701; *Harwell v. Cowan*, 175 Ga. 33 (1932).

3. *King & Spalding does business under a trade name.* King & Spalding is actually a trade name which is not the name of any of its present partners. The purpose of the Firm's use of a trade name is to give the Firm an institutional identity that is separate from the reputation of the many well-known lawyers who are presently associated with the Firm, with the expectation that the goodwill associated with the name "King & Spalding" will continue and will not be impaired by the death, retirement or transfer of any of its partners to other law firms. Corporations have long recognized the advantages of using trade names—"General Motors" or "Coca-Cola"—to give the enterprise an identity and continuity that would not be possible if business were conducted under the individual names of the dominant corporate officers and principal stockholders. By its deliberate use of a trade name, the Firm is attempting to es-

tablish and identify itself as the Coca-Cola or General Motors among law firms in Atlanta, if not nationally.

4. *Management of King & Spalding is vested in a "Board of Directors."* Management of King & Spalding is vested in a Management Committee which is elected by the partners in the same manner as "shareholders" elect Directors of a corporation, and who perform the same functions in the enterprise. While the King & Spalding Management Committee cannot alter the Firm partnership agreement (any more than the Directors of a corporation can amend its charter), the Management Committee's actions are otherwise binding on the Firm unless overridden by a 66-⅔% vote of the partners.

> "The firm shall be managed by a Management Committee comprised of five partners (the "Managing Partners") not less than one of whom shall be a partner will [*sic*] less than 900 participating units and each of whom shall be elected by the partners in the manner hereinafter provided. The members of the Management Committee shall be elected annually by the affirmative vote of partners with 66-⅔% or more of the participating units; . . . The members of the Management Committee shall select from among themselves a Chairman and a Secretary of the Management Committee. Each member of the Management Committee shall be elected to serve for a period of one calendar year. *The partners do hereby delegate to the Management Committee full and complete authority and responsibility to make any and all decisions, commitments and contracts with respect to the operation and management of the firm;* provided, however, that the Management Committee shall not have authority to act in a manner which would require a change in this Partnership Agreement for its accomplishment or implementation nor shall the Management Committee have the authority to act

with respect to any substantial question involving policies of operating the firm which, under paragraph 7 hereof, require the affirmative vote of partners with 66-⅔% of the participating units. *The Management Committee shall have full authority to create from time to time such other committees* as it might deem necessary or desirable in the proper conduct of the firm's business and to abolish any such committee so created. *The Management Committee is authorized to delegate to any other committee* which it might create such power and authority as said Committee shall deem to be proper in the circumstances; provided, however, said Committee shall continue to stand responsible to the firm for any and all action taken by any committee which it shall create. *No action taken by the Management Committee may be reversed or changed except by an affirmative vote of partners with 66-2/3% or more of the participating units.*"

Memorandum of Agreement effective as of January 1, 1978, ¶ 14.

In a common law partnership, decisions are made by a majority vote of the partners.

5. *King & Spalding partners do not own a share in the Firm assets.* A partner in King & Spalding does not acquire in any meaningful sense a pro rata ownership interest in the underlying Firm assets, as does a partner in a common law partnership.[4] When a King & Spalding partner withdraws or is expelled, he is entitled *only* to a *refund of his invested capital,* and his share of undistributed net earnings. The King & Spalding agreement expressly provides that:

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[4]The only circumstance under which a King & Spalding partner would receive a pro rata share of the underlying assets of the Firm would be in the event of a total dissolution.

"(a) It is agreed that upon the separation from the firm of any partner, whether by reason of voluntary or involuntary withdrawal or death, his interest in the firm's earnings and assets shall be as follows:

"(i) A refund of his cash capital contribution, if the firm's capital is unimpaired (to the extent there is impairment of the firm's capital, such partner shall be refunded only his proportion of unimpaired capital);

"(ii) The amount of undistributed net earnings to which he is entitled as shown by the firm's records as of the end of the month in which such withdrawal occurs."

Memorandum of Agreement effective January 1, 1978 ¶ 9(a).

In a common law partnership, a withdrawing partner would be entitled to receive a pro rata share of the firm's net assets in excess of its liabilities. Thus, although the value of King & Spalding's underlying assets (including leasehold improvements, furniture, fixtures, library and other physical assets, and its inventory of unbilled time, and accounts receivable) would probably exceed $6,000,000, a 2% partner who withdraws would not be entitled to receive 2% of $6,000,000 (*i. e.*, $120,000), but only a refund of invested capital and a 2% share of undistributed earnings.

6. ***Capital contributions at King & Spalding do not approximate the value of firm assets.*** Normally when one buys a ⅓ interest in a business having $100,000 in net assets, one would be expected to pay at least $33,333 to the existing partners for the share in the ownership of the assets being thus acquired. Although King & Spalding has also objected to discovery in this area, we believe that discovery will show that there is absolutely no relation-

ship between the size of a new partner's required capital contribution (which is rumored to be in the neighborhood of $5,000) and the fair market value of a proportionate share of the assets of the Firm at the time of his admission to partnership. If this is correct, it would undermine King & Spalding's "ownership" argument by demonstrating that the capital contribution is more nearly analogous to an "initiation fee" in a club, than it is a purchase of a share of or an "investment" in the assets of the Firm.

7. *Compensation of King & Spalding partners by partnership "points" is based on seniority and is not a return on invested capital.* Although King & Spalding has deleted the information regarding the point distributions among its partners from the copies of the partnership agreements produced for our inspection (and has refused to explain how partnership points are determined), we believe that discovery will show that a King & Spalding partner's "points" are allocated largely, if not exclusively, on a seniority basis, solely as a method of dividing Firm income among the partners, without affecting in any meaningful sense the partner's share in underlying Firm assets (see ¶ 5 above). Thus, King & Spalding partners are what the Third Circuit has described as "profit-sharing employees" of the Firm who are held out to the public as partners, but who (as noted in ¶ 6 above) have no meaningful ownership interest in underlying Firm assets beyond their own capital contributions, and unpaid shares of earned Firm income. *City of Wheeling v. Chester*, 134 F. 2d 759 (3d Cir. 1943). King & Spalding partners march up a seniority ladder in the same way that employees of large impersonal corporations receive periodic raises for

seniority, and that government employees progress from GS-9 to GS-11, etc.

8. *King & Spalding has insulated its partners from personal liability for malpractice and other tort claims just as the corporate form insulates its corporate officers from personal liability for torts committed by other corporate officers or employees.* One of the distinctions between the partnership and the corporate forms of doing business is the greater exposure of partners, than corporate officers or shareholders, to personal liability for negligence of those associated with the enterprise. We are confident that King & Spalding has effectively eliminated this distinction by purchasing liability insurance with ample policy limits to protect the Firm from any malpractice or other tort claims that may be asserted against it. Evidence of the existence and scope of such insurance coverage is plainly relevant and should, therefore, be required in response to Interrogatory No. 1(m) discussed at page 32 below.

2.

The opportunity that King & Spalding held out to plaintiff and that it holds out to all recruits, that they will be considered for partnership at the end of five years of loyal service, is a "term, condition or privilege" of employment under § 703(a) (1) of Title VII.

Even if the Court were to reject plaintiff's argument that King & Spalding has an identity separate from that of its partners for purposes of Title VII, and to hold that partnership in a law firm is not in itself an "employment" relationship which is covered by Title VII, the *opportunity* which plaintiff was offered by King & Spalding to induce her to accept employment with the Firm, and which she

possessed by *virtue of her status as an associate lawyer employed by King & Spalding,* of being considered for promotion to partnership after a minimum of five years' loyal service with the Firm, was a "term, condition or privilege of [her] employment" as an associate by King & Spalding within the meaning of § 703(a) (1) of Title VII, even if the "partnership" status itself is outside the coverage of the Act.

Even if "partnership" is itself not covered by the Act, the fact that King & Spalding holds out the opportunity of a promotion to its employees—to induce them to accept positions with the Firm in the first instance, and to remain and work extraordinarily hard as associates for at least five years—makes the *opportunity* a "term, condition or privilege of employment" which is covered by Title VII and cannot be denied on the basis of sex. *See Pettway v. American Cast Iron Pipe Co., supra,* discussed on pages 8-9, *supra.*

The complaint alleges that King & Spalding represented to plaintiff, and represents generally to other third-year law students and judicial law clerks whom King & Spalding is attempting to induce to accept employment by the Firm, that, if the associate will remain with the Firm for a minimum of five years, and will work hard and effectively during that period, the Firm will consider promoting the associate to partnership. Complaint ¶ 8(b); Answer ¶ 8(b).

The complaint also alleges and King & Spalding admits that the Firm tells all of its prospective employees that they will be afforded fair and equal consideration by

the Firm for partnership. Complaint ¶ 8(b); Answer ¶ 8 (b).[5]

The Second Circuit has held that an employee's "prospects for promotion were among the conditions of his employment." *NLRB v. Bell Aircraft Corp.*, 206 F. 2d 235, 237 (2d Cir. 1953). Furthermore, in the analogous context of employment discrimination in violation of the federal labor laws, the Supreme Court has held that, when a promotion is unlawfully denied to an employee who is covered by the Act, the protection of the statute is not lost simply because the position to which the employee would have been promoted but for the employer's unlawful discrimination was a supervisory position outside the coverage of the Act. *Golden State Bottling Co., Inc. v. NLRB*, 414 U. S. 168, 188 (1973). In that case an employee was discriminatorily denied promotion to a supervisory position which was outside the coverage of the NLRB because of his union activities. The Supreme Court cited with approval the Second Circuit's decision in *Bell Aircraft* and held that the discriminatory denial of a promotion violated the Act even though the position in management of the company was outside the coverage of the Act. The Court quoted with approval the Court of Appeals, which had said:

> "'The Act's remedies are not thwarted by the fact that an employee who is within the Act's protections

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[5]The Court can probably take judicial notice of the fact that there is vigorous competition among large law firms to hire law students who are at the top of their classes, as was plaintiff, and that such representations are essential for any law firm that hopes to recruit bright law students or law clerks—none of whom would accept employment as an associate of even a firm as prestigious as King & Spalding if the firm did not hold out as an inducement the prospect of admission to partnership.

when the discrimination occurs would have been promoted or transferred to a position not covered by the Act if he had not been discriminated against. *NLRB v. Bell Aircraft Corp.*, 206 F. 2d 235, 236-237 (2d Cir. 1953).' 467 F. 2d at 166."

414 U. S. at 188.

Pettway v. American Cast Iron Pipe Co., supra (discussed at pages 8-9, *supra*); *see also Lucido v. Cravath, Swain & Moore, supra* ("The opportunity to be promoted to a position not itself covered by Title VII does not mean that the discrimination in that promotion cannot be protected by Title VII." 425 F. Supp. at p. 128).

Thus, even if the Court should hold that partnership in a large institutional law firm is not itself an employment relationship vis-a-vis the Firm that is covered by the Act, King & Spalding's motion to dismiss must be denied because the promotional opportunity which King & Spalding holds out to each associate is a "term, condition or privilege of employment" as an associate at King & Spalding which cannot be discriminatorily denied on the basis of sex.

3.

King & Spalding's decision to deny plaintiff admission to partnership also resulted in her involuntary termination as an associate of the Firm by virtue of the application of the Firm's "up or out policy," and was, therefore, covered by Title VII.

King & Spalding baldly admits in both its Answer, ¶ 9, and in the brief filed in support of its motion that plaintiff's employment by King & Spalding as an associate was involuntarily terminated under King & Spalding's "up or out policy" because ***she was not admitted to partnership.*** See footnote 1 (pages 1-2) above.

If the Firm's decision to exclude plaintiff from partnership was based on her sex as the complaint alleges, then it is obvious that this act of discrimination also injured plaintiff in her employment by King & Spalding, and is, therefore, subject to redress under Title VII. *See Lucido v. Cravath, Swain & Moore*, 423 F. Supp. 123, 128 (S. D. N. Y. 1977).

Plaintiff's Discovery

It is the position of the plaintiff that the discovery sought from King & Spalding is directly relevant to one or more of the three legal theories outlined above, or to defenses pleaded by King & Spalding in its answer in opposition to these theories, and is, therefore, plainly authorized by Rule 26(b) (1), which defines the scope of discovery as follows:

> "(b) SCOPE OF DISCOVERY Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows"
>
> > "(1) *In General.* Parties may obtain discovery regarding *any matter,* not privileged, which is *relevant* to the subject matter involved in the pending action, *whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party,* including the existence, *description,* nature, custody, condition and location *of any books, documents,* or other tangible things and *the identity and location of persons having knowledge of any discoverable matter.* It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

Federal Rules of Civil Procedure Rule 26(b) (1).

Plaintiff's First Interrogatories to
King & Spalding served April 10, 1980

King & Spalding's General Objections

Despite the provisions of Local Rule 91.613, which states that "objections . . . shall be addressed to the specific interrogatory . . . and may not be made generally," King & Spalding has made the following "General Objections" to plaintiff's interrogatories, each of which should be overruled:

King & Spalding's General Objection No. 1

> "This defendant objects to plaintiff's First Interrogatories to the extent that they seek information regarding any period of time other than the 'Time Period' as defined in paragraph 3 of the Interrogatories on the ground that information regarding any other time is not related to the subject matter of the pending action and is not reasonably calculated to lead to the discovery of admissible evidence and on the further ground that the burden on this defendant to respond to interrogatories with regard to any other time far exceeds the value to plaintiff of the information sought."

Plaintiff's Response

While King & Spalding's blanket objection to being required to respond to any discovery outside January 1, 1972-December 31, 1979, the "Time Period" defined in plaintiff's First Interrogatories, does not present a problem with respect to most of the questions propounded by plaintiff in the first set of interrogatories, it is important to establish the principle *now* that when discovery focuses on the *merits* of the case, King & Spalding will not be entitled to restrict plaintiff's right to conduct discovery aimed at developing evidence of its discriminatory hiring

and promotional practices, its attitudes and statistical data, only for the seven years of plaintiff's employment as an associate by King & Spalding. It is plaintiff's position that plaintiff will be entitled to full discovery covering a substantial period of time preceding her employment as an associate in 1972 for the purpose of establishing that King & Spalding discriminated *tota'ly* against women (and Jews and blacks) prior to that time,[6] and that those discriminatory attitudes on the part of some individuals composing a voting majority of King & Spalding partners, while perhaps less overt and more subtle, continue to have an impact on the Firm's attitudes, policies and treatment of women generally and plaintiff in particular. This case is no different from an antitrust case, in which the courts generally, and Your Honor in particular, have ruled that evidence of conspiratorial acts of defendants occurring long before the period open under the statute of limitations is not only discoverable under Rule 26, but *admissible* at a trial for purposes of proving that the defendants also conspired at some later time.

King & Spalding's General Objection No. 2

> **"This defendant objects to plaintiff's First Interrogatories to the extent that they request this defendant to 'identify' documents on the grounds that said request is unduly burdensome and repetitious in light of plaintiff's Request for Production of Documents, which was filed contemporaneously with plaintiff's First Interrogatories and seeks the production**

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[6]King & Spalding employed a woman lawyer, Antha Mulkey, as a "permanent associate" until 1977. See Martindale-Hubbell Law Directory for the years 1964-1977. Ms. Mulkey's status will be the subject of extensive examination when we reach merits discovery.

> of all documents identified in King & Spalding's responses to those interrogatories."

Plaintiff's Response

An interrogatory which requests the identification of documents in the possession of or known to a party that refer to subjects relevant to the litigation is expressly authorized by Rule 26(b) (1) quoted above and is plainly "calculated to lead to the discovery of admissible evidence" and is, therefore, unquestionably proper.

King & Spalding's objection on ground of burden is both frivolous and disingenuous: It is frivolous because plaintiff's First Interrogatories specifically relieved King & Spalding of the burden of preparing a tedious list of documents if the Firm would attach legible copies of the documents to its answers.

> In lieu of identification of a document, defendant may attach a legible copy of the documents to its answers to these interrogatories, *provided* that the documents so attached are specifically marked so as to indicate the particular interrogatory to which each document is deemed responsive."
>
> **Plaintiff's First Interrogatories to King & Spalding, p. 3.**

It is disingenuous to imply—as King & Spalding does by its statement that the "request is unduly burdensome and repetitious in light of plaintiff's Request for Production of Documents . . . ,"—that the Firm intended to produce the requested documents for inspection under Rule 34 and, therefore, should not be required to list them in answers to the interrogatories—when the Firm has "stonewalled" the production of documents in response to plaintiff's First request for Documents. The only documents

produced by King & Spalding were abridged copies of its partnership agreements—which Your Honor specifically said at the conference in chambers on April 15, 1980 would have to be produced by King & Spalding, and a Confidential Memorandum to All Associates dated January 20, 1975, which counsel for the plaintiff had already advised counsel for the defendant, Mr. Handley, was in the possession of plaintiff in a telephone call on May 9, 1980.

King & Spalding's General Objection No. 3

> "This defendant objects to plaintiff's First Interrogatories to the extent that they seek the identification or disclosure of any communication or document protected from discovery by the attorney work-product doctrine or the attorney-client privilege."

Plaintiff's Response

While plaintiff does not dispute that *under appropriate circumstances* King & Spalding may be entitled to withhold production of documents that are protected by the attorney-client privilege or work-product, the Firm cannot refuse to *identify* documents for which it intends to claim a privilege. Identification of responsive documents being withheld under a claim of privilege is essential so that plaintiff will know that a document (or conversation) exists for which a privilege is being claimed. Since the burden rests on the person claiming a privilege to demonstrate its availability [*United States v. Kelly*, 569 F. 2d 928, 938 (1978), *cert. denied*, 439 U. S. 829 (1978); *Barkley-Cupit Enterprises, Inc. v. The Equitable Life Assurance Society of the U. S.*, N. D. Ga. C-79-5858 (Mar. 14, 1980)], King & Spalding is under an obligation

not only to identify the document itself with reasonable particularity, but also to provide sufficient facts to indicate that the privilege being claimed is at least *prima facie* applicable. *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1156-58 (D. S. C. 1974). Without this minimal information, neither the plaintiff nor this Court can make an informed judgment whether the privilege was claimed properly or improperly, and whether to contest the claims of privilege by seeking an *in camera* inspection by the Court.

Because of the blanket objections by King & Spalding, plaintiff is unable to tell whether King & Spalding has, in fact, refused to identify any documents which actually exist (or failed to disclose any other information called for by the plaintiff's First Interrogatories) on the ground that such documents or information are protected from discovery or as work product or on grounds of the attorney-client privilege. We assume, however, that King & Spalding would not trifle with the Court by filing a blanket general objection on grounds of privilege if there were no documents or other information called for by plaintiff's First Interrogatories for which it was making a claim of privilege.

Particular Interrogatories Which King & Spalding Should be Compelled to Answer

In addition to the "general objections," King & Spalding has also objected to and refused to answer the following interrogatories:

Plaintiff's Interrogatory No. 1(c)

"(c) (1) Has the defendant or any partner thereof prepared any document which describes or summarizes the history of the defendant?

"(2) If so, please identify each such document."

King & Spalding's Response to Interrogatory No. 1(c)

"(c) This defendant objects to subpart (c) of Interrogatory No. 1 on the grounds set forth in General Objection No. 1, which General Objection is incorporated herein by reference. Subject to and without waiving this objection, this defendant states that neither the defendant nor any partner thereof has prepared any document which describes or summarizes the history of the defendant during the Time Period as defined in plaintiff's Interrogatories."

Plaintiff's Reasons for Compelling an Answer

A firm history prepared prior to January 1, 1972 may contain evidence directly relevant to the "coverage" question presently before the Court. For example, a firm history prepared prior to the 1972-1979 Time Period might contain information touting the "Firm" as an institution separate and distinct from its partners, and emphasizing that "the whole [Firm] is greater than the sum of its part[ners]."

This information would be directly relevant to plaintiff's contention that the fact that King & Spalding is a partnership does not automatically remove the Firm from the coverage of Title VII, and that the economic reality of King & Spalding's organizational structure and methods of operation are sufficiently similar to those of other businesses to require that King & Spalding's promotional decisions be subjected to the same prohibitions against discrimination on the basis of sex, race and religion as are the promotional decisions of many smaller businesses that have at least 15 employees.

Plaintiff's Interrogatory No. 1(d) (1)

"(d) (1) When did defendant revert to the name "King & Spalding?

"(2) Please identify all such documents which refer to the reasons that defendant decided to use the name 'King & Spalding.'

"(3) To the extent the reasons for the defendant's reverting to the name 'King & Spalding' are not fully stated in the document identification of which is requested in subparagraph (2) above, please state such reasons."

King & Spalding's Response to Interrogatory No. 1(d) (1)

"(d) This defendant objects to subpart (d) of Interrogatory No. 1 for the reasons set forth in General Objection No. 1, which General Objection is incorporated herein by reference. Subject to and without waiving this objection, this defendant states:

"(1) A law firm known by the name King & Spalding has existed at several times as reflected in the answer to subparts (a)-(b) above. This defendant adopted the name of King & Spalding in 1962."

Plaintiff's Reasons for Compelling an Answer

King & Spalding appears to be contending that because it adopted the trade name "King & Spalding" in 1962, before plaintiff's employment, the *reasons* that the Firm chose to conduct its business under a trade name, rather than under the name of its then active partners as most other law firms in Atlanta have done, are irrelevant.

King & Spalding's reasons for using a trade name are relevant to support plaintiff's contention that the Firm has sought and acquired for itself an *impersonal, institutional*

identity separate from that of its partners, and should, therefore, be treated for Title VII purposes as other business entities are treated. *See Bellis v. United States, supra.*

Plaintiff's Interrogatory No. 1(f)

> "(f) (1) Were there any portions of the partnership agreement of defendant in effect during the Time Period which are not fully set forth in the written partnership agreements referred to in subparagraph (e) above?
>
> "(2) If the answer is 'yes,' please state the full terms of the portions of the partnership agreement that were not in writing, and the time periods during which such unwritten portions of the partnership agreements were in effect."

King & Spalding's Response to Interrogatory No. 1(f)[7]

> "(f) (1) See Response to Interrogatory 1(e) (1) above.
>
> "(2) not applicable."

Plaintiff's Reasons for Compelling an Answer

A responsive answer to Interrogatory No. 1(f) (1) is either "yes" or "no." Plaintiff is unable from the answer as presently framed to determine whether the *written* partnership agreements constitute *all* of the agree-

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[7] In its response to Interrogatory No. 1(e)(1), King & Spalding said:

> "At various times during the Time Period, the firm has had a written partnership agreement in effect. At other times within the Time Period, there was no written agreement in effect, due generally to the fact that a new agreement was not immediately prepared or executed upon a change in the membership of the partnership."

ments between partners, or whether there are additional oral understandings between partners at King & Spalding that constitute a part of the partnership agreement, but have not been reduced to writing. A responsive answer to Interrogatory No. 1(f) (1) [*i.e.*, "yes" or "no"] should be required.

If the answer to Interrogatory No. 1(f)(1) is "yes," King & Spalding should be required to provide the information called for by subparagraph 1(f) (2).

Plaintiff's Interrogatory No. 1(h)

> "(h) Please (1) describe the organizational structure of defendant during the Time Period, and (2) identify all committees, departments and administrative positions of the defendant, and state with respect to each such committee, department or administrative position:
>
> "(A) Its name.
>
> "(B) Identify all documents that set forth the duties and responsibilities of each such committee, department, or administrative position, or, if such duties are not fully set forth in written form, state the duties and responsibilities of each.
>
> "(C) The names of the members of each such committee or department, or the holder of any administrative position, during each year since January 1, 1972.
>
> "(D) Identify by categories the records maintained by each such committee, department or administrative position."

King & Spalding's Response to Interrogatory No. 1(h)

> "(h) This defendant objects to subpart (h) of Interrogatory No. 1 on the ground that the request

to describe 'the organizational structure' of this defendant is unduly vague and not subject to a reasonable interpretation and upon the further ground that said request is unduly burdensome upon this defendant. Subject to and without waiving this objection, this defendant states that various committees or administrative positions existed within the firm for part or all of the Time Period. As a preface to the description of these committees or positions, this defendant states that the primary duty of every lawyer at King & Spalding, whether partner or associate, is the practice of law. The administrative positions described below constitute collateral administrative duties which are performed by various partners at various times, but these duties are at all times secondary to the practice of law. Further, all of these committees or administrative positions are ultimately accountable to the partnership as a whole, which retains the ultimate decision-making power on all substantial questions involving policies of operating the firm. See §§ 7.14 of Partnership Agreement.

"(1) (A) The Management Committee

"(B) The duties and responsibilities of the Management Committee are defined in the Partnership Agreement. The Management Committee in its present form (originally called the Executive Committee) was formed by the partnership in 1974.

"(C) King and Spalding objects to this subpart to the extent that it seeks the identification of members of the Management Committee of King & Spalding at any time other than May, 1978 or May, 1979, in that such information is not related to the subject matter of plaintiff's action and is not reasonably calculated to lead to the discovery of admissible evidence with regard to this action. Subject to and without waiving this objection, this defendant states that, as of May, 1978, the Management Committee of King & Spal-

ding was comprised of the following individuals: Hughes Spalding, Jr., James M. Sibley, Byron Attridge, Robert L. Steed, and Harry C. Howard. As of May, 1979, the Management Committee was comprised of the following individuals: James M. Sibley, Byron Attridge, Robert L. Steed, Harry C. Howard, Robert W. Hurst.

"(D) Minutes of the meetings of the Management Committee exist for the period from 1972 to the present.

"(2) (A) Lawyer Administrative Partner

"(1) (B) During the Time Period, the Lawyer Administrative Partner had overall responsibility for recruitment, employment, assignment, evaluation and supervision of all legal and paralegal personnel, with the mandate to insure that professional obligations are carried out on all client matters with quality, service and timely performance and with a view toward the harmony of working conditions for legal and paralegal personnel. The Lawyer Administrative Partner serves as the person to whom any lawyer in the firm may express any opinion or view which he wishes to communicate to the partnership. The Lawyer Administrative Partner also has such other duties as the Management Committee may define from time to time.

"(2) (B) These duties are outlined in a 1975 memorandum to all firm personnel from the Management Committee ('1975 Memorandum'). The duties outlined in the 1975 Memorandum have been modified and reassigned from time to time.

"(C) James M. Sibley

"(D) The Lawyer Administrative Partner maintains no such records with regard to this administrative position.

"In addition to the two specific positions discussed above, this defendant has during the Time Period, as

outlined in the 1975 Memorandum, also had Finance, Office, and Client Administrative Partners, as well as a Hiring Committee, a Fee and Client Committee, a Secret Art Committee, an Associate Orientation Committee, an associate Partner, a Paralegal Administrative Partner, and various other positions or committees at various times. The committees and administrative positions are appointed by the partnership or the Management Committee on an ad hoc basis and perform duties and responsibilities as assigned. This defendant objects to providing information in addition to that provided in the 1975 Memorandum for these committees or positions on the ground that said requests are overly broad and unduly burdensome.

"For further answer, this defendant states that during the Time Period, it has been more or less divided for certain administrative purposes into the following departments: Corporate, Antitrust, Securities, Municipal Finance, Banking, Litigation, Real Estate and Tax. Matters are frequently handled by lawyers from more than one department, depending on the nature of the legal problem faced by the client. Moreover, lawyers initially assigned to one department frequently move to other departments. Plaintiff was, at all times during her employment with King & Spalding, assigned to the Real Estate Department. This defendant objects to identifying the Administrative Partners and attorneys assigned to various departments on the ground that said identification relates to the merits of this action, discovery on which has been stayed pending a ruling by the Court on this defendant's jurisdictional objections to plaintiff's claim."

Plaintiff's Reasons for Compelling an Answer

(1) A request that a business entity describe its organizational structure is not vague.

(2) King & Spalding's objection to disclosing the names of members of its Management Committee and

other committees at any time other than May 1978 and May 1979 should be overruled. Plaintiff is entitled to the identification of *all* persons who were members of the Management Committee during the 1972-1979 time period, because they may have recollections of facts pertaining to the operations, policies, structure and reporting relationships and procedures for selecting and admitting partners and determining their compensation, that are not the same as those of the individuals who happened to hold those offices in May 1978 and May 1979. See Rule 26(b)(1) which expressly makes the identity of potential witnesses discoverable.

(3) Plaintiff is entitled to an identification of all documents which are requested in Interrogatory No. 1 (h)(2)(B) defining the duties and responsibilities of King & Spalding's committees, departments and positions. Rule 26(b)(1). Such documents are plainly relevant to show that King & Spalding is centrally managed—much as a corporation is managed—and not as a plebiscite among partners meeting as a committee of the whole.

(4) Plaintiff is entitled to identification of the categories of records maintained by each committee, department and administrative partner of King & Spalding, as requested by Interrogatory No. 1(h)(2)(C). Such information may lead to the discovery of evidence relevant to support plaintiff's contention that King & Spalding is operated internally as a corporation is operated and to assist plaintiffs in framing a Notice to Produce.

(5) Because of the enormous power conferred on King & Spalding's Management Committee or "Board of Directors" by the partnership agreement, minutes of that

committee and of the Firm as a whole are likely to contain highly relevant evidence that will demonstrate—as the bare bones agreement does not—how the Management Committee has operated *in fact*, what categories of decisions are deemed by the Management Committee to be within its jurisdiction, and the extent to which decisions or "recommendations" of the Management Committee are "rubber stamped" by the Firm as a whole. Plaintiff cannot tell from the partnership agreement, for example, whether a recommendation that a particular associate be promoted to partnership is one which is made by the Management Committee in the first instance, and, if recommended by the Management Committee, whether that recommendation is one which is binding on the Firm unless rejected by a 66-2/3 vote of the points, or one which fails unless affirmatively approved by a 66-2/3 vote. *How* partnership decisions are made is a central issue to the coverage question before the Court and a complete response to Interrogatory No. 1(h) and complete production of the minutes and other documents description of which is requested therein should be required.

Plaintiff's Interrogatory No. 1(i)

> **"(i) With respect to 'Administrative Partner' positions of the defendant which existed at any time during the Time Period, state the following information:**
>
> **"(1) Identify the title of the position.**
>
> **"(2) (A) Identify all documents which set forth or define the duties and responsibilities of such position, and (B) if such duties and responsibilities are not fully set forth in written form, state the unwritten powers and duties of each such position.**

"(3) Identify each person holding such position during the Time Period.

"(4) Identify by type or category and a general description of contents the records maintained by or under the supervision of the person in such position."

King & Spalding's Response to Interrogatory No. 1(i)

"(i) King & Spalding objects to subpart (i) of Interrogatory No. 1 to the extent that it seeks information with regard to the 'Administrative Partner' positions other than what is described in the 1975 Memorandum and the responses to subpart (h) above on the grounds that such information is not related to the subject matter of the pending action and is not reasonably calculated to lead to the discovery of admissible evidence. With regard to the Lawyer Administrative Partner, see the responses to subpart (h) above."

Plaintiff's Reasons for Compelling an Answer

All of the information requested by Interrogatory No. 1(l) is relevant in itself, or is at least reasonably calculated to lead to the discovery of relevant evidence, for the same reasons the information requested in Interrogatory No. 1(h) is discoverable.

Plaintiff's Interrogatory No. 1(j)

"(j) Does the defendant maintain minutes or other documents reflecting the substance of (1) general meetings of defendant's partners, (2) general meetings of defendant's partners and associates, (3) meetings of committees of the defendant, and (4) meetings of departments of the law firm, and, if so, for what period of time have such minutes or other documents been maintained?"

King & Spalding's Response to Interrogatory No. 1(j)

"(j) This defendant objects to subpart (j) of Interrogatory No. 1 for the reasons set forth in General Objection No. 1, which General Objection is incorporated herein by reference. Subject to and without waiving this objection, this defendant maintains minutes or records of the meetings of the following committees for the period of time shown:

"Management Committee (1972—Present; provided, however, that prior to 1977, such minutes were prepared and maintained on a sporadic basis).

"Partnership Meetings (1972—Present). This defendant also maintains for certain periods of time minutes of the meetings of its Hiring Committee, but objects to the identification or production of those minutes on the ground that they are not related to the subject matter of the pending action and are not reasonably calculated to lead to the discovery of admissible evidence."

Plaintiff's Reasons for Compelling an Answer

As explained in the discussion of Interrogatory No. 1(h) above, minutes of meetings of defendant's committees, and particularly minutes of the general partnership meetings and of the Management Committee, are likely to contain evidence demonstrating that the Firm is operated in the same manner as business corporations. This includes evidence that primary authority and that control of the business operations of the Firm are concentrated in King & Spalding's equivalent of a corporate Board of Directors. Minutes of such meetings will also show *how*, and by *whom*, lawyers are admitted to partnership, as a practical (as distinguished from a theoretical) matter. Identification and production of the minutes should be required since the minutes are reasonably calculated to lead to the discovery of evidence relevant to the coverage question.

Plaintiff's Interrogatory No. 1(k)

> "(k) Please identify all documents which refer to or reflect the following information pertaining to (1) the defendant's policy and procedure for determining capital or other financial contributions required by the defendant in connection with the admission of a new partner to the firm, (2) the percentage of ownership of the assets of the defendant acquired by a new partner, (3) the percentage or amount of firm capital or assets which a partner is entitled to receive as a matter of right from the firm upon voluntary withdrawal, expulsion, or death."

King & Spalding's Response to Interrogatory No. 1(k)

> "(k) This defendant objects to subpart (k) of Interrogatory No. 1 for the reasons set forth in General Objection No. 1, which General Objection is incorporated herein by reference. This defendant further objects to subpart (k) of Interrogatory No. 1 on the ground that the information sought therein is not related to the subject matter of the pending action and is not reasonably calculated to lead to the discovery of admissible evidence with regard to this action. Subject to and without waiving its objection, this defendant states that information of the nature sought in subpart (k) is included in the Partnership Agreement."

Plaintiff's Reasons for Compelling an Answer

Defendant contends that "ownership" is a predominant factor in becoming a partner in King & Spalding. Plaintiff is entitled to discover information called for by Interrogatory No. 1(k) (1) and (2) that will rebut this contention by demonstrating that new partners are required to make only modest or nominal contributions to Firm Capital, that are much less than the value of their proportionate share of underlying Firm assets, and that

the income which a new partner receives from the Firm is in reality compensation for personal services, and not a "dividend" or other return on his nominal capital investment. None of this information is contained in the censored versions of the partnership agreements produced by defendant. Specific dollar figures are relevant because they will show in concrete terms precisely how extreme and disproportionate are the relationships between the amount of a new partner's capital contribution as compared to his income from the Firm, and to the value of underlying Firm assets.

Plaintiff's Interrogatory No. 1 (l)

> "(l) Please (1) identify all documents which set forth the procedure, method, system or criteria used by the defendant or any committee thereof to determine the compensation of partners in defendant, and (2) if such procedure or method is not fully set forth in any documents, please state the procedure, method, system or criteria used by the defendant to determine the compensation of partners."

King & Spalding's Response to Interrogatory No. 1 (l)

> "(l) This defendant objects to subpart (1) of Interrogatory No. 1 on the grounds that the information requested therein is not related to the subject matter of the pending action and is not reasonably calculated to lead to the discovery of admissible evidence with regard to this action.
>
> "This defendant further objects to subpart (1) to the extent that it seeks information about procedures or criteria used at any time other than the Time Period for the reasons set forth in General Objection No. 1, which General Objection is incorporated herein. Subject to and without waiving this objection, this defendant states:

"(1) None other than the Partnership Agreement.

"(2) The procedures for determining the compensation of partners within this defendant vary from year to year, but generally involve obtaining an agreement of the partnership as a whole, as provided by §§ 7, 14 of the Partnership Agreement."

Plaintiff's Reasons for Compelling an Answer

Information as to the procedure, method, system or criteria used by the Firm in determining compensation of partners is directly relevant to show (1) that King & Spalding's compensation system is very similar to the impersonal seniority-based systems used by the Federal Government and many corporations to compensate their employees, (2) that the amount of a partner's compensation cannot be increased by an individual partner's decision to unilaterally increase his capital contribution (thus demonstrating that partnership income is *not* a payment for "ownership" rights in the Firm or a "dividend" on invested capital, but compensation for work performed for Firm clients that is indistinguishable from the work performed by other lawyers in the Firm who happen to be associates rather than partners), and (3) that partners at King & Spalding are, in real economic terms, as much "profit-sharing employees" of the Firm, as were the partners in the engineering firm in *City of Wheeling v. Chester*, 134 F. 2d 759 (3d Cir. 1943).

If rumors among the Atlanta Bar are correct, in 1978 or 1979, King & Spalding established two classes of new partners—one group of new ("full") partners who receive a full allocation of points available for first-year partners, and a second category of new partners who receive a less-

than-full allocation of partnership points than those allocated to "first-class" new partners. Such evidence would tend to reinforce plaintiff's contention that at least some individuals who are nominally called "partners" in defendant do not have the full status of other partners and that an intervening position has been created by King & Spalding for lawyers who are neither "associates" nor "partners," which might have been made, but was not, available to plaintiff due to her sex.

Plaintiff's Interrogatory No. 1(m)

> "(m) (1) Did the defendant maintain professional malpractice insurance during the Time Period?
>
> "(2) If so, please state the monetary limits of such policies applicable to errors, omissions or professional malpractice by (A) partners of defendant, (B) associates of defendant."

King & Spalding's Response to Interrogatory No. 1(m)

> "(m) King & Spalding objects to subpart (m) of Interrogatory No. 1 on the grounds that said Interogatory relates to a defense asserted by this defendant to plaintiff's claim and therefore is not properly within the scope of discovery as authorized by the Court's Order of April 15, 1980 [*sic*, April 23, 1980]. King & Spalding further objects to Interrogatory 1(m) on the grounds that said Interrogatory relates to the merits of this action, discovery on which has been stayed pending a ruling by the Court on this defendant's jurisdictional objections to plaintiff's claim. Subject to and without waiving this objection, this defendant states:
>
> "(1) Yes.
>
> "(2) This defendant objects to subpart (2) of part (m) of Interrogatory No. 1 on the grounds that the information requested therein is not related to the subject matter of the pending action and is not

reasonably calculated to lead to the discovery of admissible evidence with regard to this action."

Plaintiff's Reasons for Compelling an Answer

In its brief in support of its motion to dismiss, King & Spalding has attempted to capitalize upon the fact that "a mistake by any partner becomes, in the eyes of the law, the mistake of the partnership, and accordingly threatens the professional and economic well-being of all partners" (Brief p. 18) to argue that King & Spalding should be able to discriminate on the basis of race or sex in the admission of partners. King & Spalding conveniently omits to mention that the Firm is liable for the "mistakes" of its *lawyers* in the performance of their professional practice, without regard to whether the negligent lawyer is a "partner" or an "associate." Since King & Spalding has raised the specter of malpractice liability, however, plaintiff is entitled to discovery to show that the Firm has obtained insurance that insulates it from that risk.

The existence and amount of King & Spalding's malpractice insurance is relevant to demonstrate that, as a practical matter, King & Spalding partners are as insulated from personal liability for the acts of negligence on the part of a new partner, as are officers and shareholders of corporations for the acts of negligence on the part of other corporate officers and employees. Thus, one of the principal distinctions between the partnership and corporate forms of transacting business has been effectively eliminated in King & Spalding's case by the existence of liability insurance with large policy limits.

Plaintiff's Interrogatory No. 5

"Please identify all documents which state, in whole or in part, the standards, criteria, procedures

or policies utilized by defendant during the Time Period concerning the following subjects:

"(a) Evaluation of Associate Performance, including but not restricted to (1) criteria for evaluation of associates, (2) coordination of evaluation by partners, (3) communication to partners and to associates individually the results of associate evaluations, (4) criteria for admission to partnership, and (5) decisions or recommendations of termination of associates.

"(b) Criteria for advancement to partnership.

"(c) Compensation policies for legal personnel.

"(d) Establishment of number of lawyers to be hired, or admitted to partnership.

"(e) Equal employment practice policies pertaining to legal personnel.

"(f) Hiring, including but not limited to (1) criteria for job offer, (2) Recruiting Committee procedures, (3) policies regarding employment of lawyers."

King & Spalding's Response to Interrogatory No. 5

"King & Spalding objects to Interrogatory No. 5 on the grounds that said Interrogatory relates to a defense asserted by this defendant to plaintiff's claims and therefore is not properly within the scope of discovery as authorized by the Court's Order of April 15, 1980 [*sic*, April 23, 1980]. King and Spalding further objects to Interrogatory No. 5 on the grounds that said Interrogatory relates to the merits of this action, discovery on which has been stayed pending a ruling by the Court on this defendant's jurisdictional objections to plaintiff's claim."

Plaintiff's Reasons for Compelling an Answer

As we have pointed out in discussing Interrogatory No. 1(c) and 1(h) above, plaintiff is entitled to discovery

regarding the internal standards, procedures, criteria and policies utilized by King & Spalding, for the purpose of demonstrating that, although the Firm is technically organized in the form of a common law partnership, the *substance* and reality of the Firm's operations, and in particular its *method* of making employment and promotional decisions, are highly institutionalized and impersonal as are similar decisions by other business entities. In this interrogatory plaintiff is not attempting to develop evidence that King & Spalding in fact discriminated against plaintiff or any other individual, but that the *methods* and *procedures* utilized by King & Spalding were such that King & Spalding should be treated as any other business entity is treated for purposes of Title VII. Interrogatory No. 5(e), which asks about internal documents reflecting King & Spalding's EEOC policies pertaining to legal personnel, may contain admissions of fact or law that are inconsistent with the contentions being advanced by King & Spalding in support of its motion to dismiss.

Plaintiff's Interrogatory No. 6

> "With reference to the Fifth Defense stated in the answer that "[p]laintiff's claims under Title VII are barred because defendant is not a person engaged in an industry affecting commerce within the meaning of Title VII," please state the following information:
>
> "(a) Please state all facts on which defendant relies to support such contention.
>
> "(b) Please identify all documents on which defendant relies to support such contention.
>
> "(c) Please identify all persons who are known to defendant or to defendant's attorneys to have personal knowledge of such facts."

King & Spalding's Response to Interrogatory No. 6

> "This defendant objects to Interrogatory No. 6 on the grounds that said Interrogatory seeks information regarding a defense to plaintiff's claim of employment discrimination and, therefore, is beyond the scope of discovery authorized by the Court in its ruling on April 15, 1980 [*sic*, April 23, 1980]."

Plaintiff's Reasons for Compelling an Answer

Defendant has moved to dismiss the plaintiff's Title VII claims on the ground that King & Spalding's actions with reference to the plaintiff are not covered by Title VII as a matter of law. One of the grounds for this contention is apparently its Fifth Defense quoted above.

In its Order of April 23, 1980, the Court limited discovery to the threshhold question of the coverage of King & Spalding by Title VII, to which the Fifth Defense is plainly relevant. Since Rule 26(b)(1) provides that discovery may be had "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the *claim* or defense of the party seeking discovery *or to the claim or defense of any other party . . .*," the information sought by Interrogatory No. 5 is plainly discoverable and King & Spalding should be required to answer.

Plaintiff's Interrogatory No. 7

> "With reference to the allegations of paragraph 2(a) of the Eighth Defense of the answer that "defendant denies that it is a person engaged in an industry affecting commerce," please state the following information:
>
> "(a) Please state all facts on which defendant relies to support such contention.

"(b) Please identify all documents on which defendant relies to support such contention.

"(c) Please identify all persons who are known to defendant or to defendant's attorneys to have personal knowledge of such facts."

King & Spalding's Response to Interrogatory No. 7

"This defendant objects to Interrogatory No. 7 on the grounds that said Interrogatory seeks information regarding a defense to plaintiff's claim of employment discrimination and, therefore, is beyond the scope of discovery authorized by the Court in its ruling on April 15, 1980 [*sic*, April 23, 1980]."

Plaintiff's Reasons for Compelling an Answer

King & Spalding should be required to answer Interrogatory No. 7 for the same reasons it should be compelled to answer Interrogatory No. 6.

Plaintiff's Interrogatory No. 8

"(a) Does defendant contend that it is not engaged in interstate commerce?

"(b) If so, please state the following information with respect to defendant's last complete fiscal year:

"(1) The total fees received by the defendant for the rendition of legal services and the amount of fees billed by defendant's (A) Atlanta office and (B) defendant's Washington office.

"(2) The total revenues of the defendant derived from legal services rendered to clients with respect to litigation pending in Georgia, real estate transactions involving real property located exclusively in Georgia, bond or other securities, offerings for offerors located exclusively in

Georgia where all the purchasers located within Georgia.

"(3) The total revenues derived by defendant from the following:

"(A) The rendition of legal services with reference to any court or administrative proceedings located outside Georgia.

"(B) The rendition of legal services with reference to any real estate transactions involving property outside the State of Georgia.

"(C) The rendition of legal services in connection with any offering or sale of securities by an issuer having its principal place of business outside the State of Georgia, or which required registration, or exemption under the laws of a state other than Georgia, or which was closed outside the State of Georgia.

"(D) The rendition of any other legal services to clients whose principal offices were located outside the State of Georgia, and which involved the application of procedural or substantive law of a state other than Georgia.

"(4) (A) The number of trips made by lawyers of defendant to points outside Georgia in the course of rendering professional services for clients, (B) the number of days spent by lawyes of defendant outside the State of Georgia in the course of rendering professional services for clients, and (C) the cost of such trips to the defendant or its clients.

"(5) (A) The number and (B) cost of long distance telephone charges incurred by defendant in the course of rendering professional services for clients."

King & Spalding's Response to Interrogatory No. 8

"(a) This defendant contends that it is not engaged in interstate commerce within the meaning of Title VII, which refers to a 'person engaged in an industry affecting commerce,' in that this defendant is engaged in a profession, not an industry. This defendant states, however, that it derives a substantial portion of its total fees from clients who reside or have their principal place of business outside of the State of Georgia and will further stipulate that, in performing legal services for these clients and for its clients within the State of Georgia, lawyers who are members of or are employed by this defendant make numerous trips to points outside of Georgia. This defendant further states that these trips are made in association with, *inter alia*, rendering legal services in court or administrative proceedings located outside of Georgia, rendering legal services with reference to real estate transactions involving real property outside of the State of Georgia, rendering legal services in connection with the sale of securities by an issuer having its principal place of business outside of the State of Georgia, and rendering other legal services to clients whose principal offices are located outside the State of Georgia.

"(b) King & Spalding objects to subpart (b) of Interrogatory No. 8 on the grounds that, in light of the facts stated in its response to subpart (a) above, the specific information requested in subpart (b) is overly broad and unduly burdensome to this defendant."

Plaintiff's Reasons for Compelling an Answer

King & Spalding's answer to Interrogatory No. 8 is ambiguous and evasive. If King & Spalding intends its answer to mean that it concedes that the Firm is "engaged in interstate commerce" (so that the fact and amount of the interstate commerce conducted by King & Spalding is

not an issue in the case and need not be proved by plaintiff), but that because the Firm is engaged in the practice of law, rather than some other business, it is not engaged in an "industry, then King & Spalding should say so clearly and unequivocally.

If King & Spalding intends to preserve the interstate commerce issue so that it can argue later that the Firm is not engaged in interstate commerce, it should be required to answer Interrogatory No. 8(b).

The basis for King & Spalding's claim that it is engaged in a "profession" and not an "industry" for purposes of Title VII should have been disclosed in response to Interrogatories Nos. 6 and 7, and is, in any event, without merit under the rulings of the Supreme Court in *Goldfarb v. Virginia State Bar*, 421 U. S. 773 (1975), and *Bates v. Arizona*, 433 U. S. 350 (1977), and the cases cited at page 2 above in which Title VII jurisdiction over law firm employment practices has been sustained.

Plaintiff's Interrogatory No. 10

> "With reference to the allegations of Paragraph 9 of the Eighth Defense that defendant had a "practice of not employing permanent associates," please state the following information:
>
> "(a) When and how was this policy adopted?
>
> "(b) Is this policy reflected by any documents, and, if so, please identify all such documents?
>
> "(c) (1) Has the defendant made any exceptions to the policy since its adoption? If so, (2) please describe each individual for whom an exception was made, (3) the reasons for the exception, and (4) identify all documents reflecting such reasons.

"(d) (1) Under defendant's policy, does an associate have the alternative of remaining as an employee of the firm? If so, please state (2) the length of time that the associate is permitted to remain an employee of the firm, and (3) any changes or modifications in the compensation, terms and conditions of employment that would apply to an associate who has been denied partnership that would not be applied to other associates who have not been refused admission to partnership.

King & Spalding's Response to Interrogatory No. 10

"King & Spalding objects to Interrogatory No. 10 on the grounds that said Interrogatory relates to a defense asserted by this defendant to plaintiff's claim and therefore is not properly within the scope of discovery as authorized by the Court's Order of April 15, 1980 [*sic*, April 23, 1980]. King & Spalding further objects to Interrogatory No. 10 on the grounds that said Interrogatory relates to the merits of this action, discovery on which has been stayed pending a ruling by the Court on this defendant's jurisdictional objections to plaintiff's claim."

Plaintiff's Reasons for Compelling an Answer

In the discussion of the significance of King & Spalding's acknowledged "up or out policy" at page 17, *supra*, plaintiff has demonstrated the relevance of that policy to the coverage issue before the Court. Plaintiff is plainly entitled to discovery as to the factual details of defendant's "up or out policy" for the purpose of demonstrating *how* that policy was applied and, thus, supporting her contention that termination of her employment was caused by defendant's decision to refuse to admit her to partnership on the basis of sex, and, therefore, constitutes unlawful employment discrimination covered by Title VII.

Plaintiff's First Notice to Produce Documents

Plaintiff's first notice to produce documents requested production by King & Spalding of all of the documents, identification of which was called for by plaintiff's first interrogatories.

King & Spalding's Response

> "King & Spalding objects to plaintiff's First Notice to Produce to the extent that it seeks the production of any documents other than the partnership agreement, and amendments thereto, in effect for King & Spalding during the period from January 1, 1972 through December 31, 1979, and the 1975 Memorandum, on the grounds that discovery of the contents, as opposed to the existence, of any of the other documents identified in King & Spalding's Responses to Plaintiff's First Interrogatories, would relate either to a defense asserted by King & Spalding to plaintiff's claim or to the merits of this action, and discovery as to King & Spalding's defenses and the merits of plaintiff's claim has been stayed by the Court's Order of April 15, 1980 [*sic*, April 23, 1980], pending a ruling by the Court on King & Spalding's jurisdictional objections to plaintiff's claim. Accordingly, King & Spalding states that the only documents which it will produce for plaintiff's inspection and copying at this time are the partnership agreement and amendments thereto, in force and effect during the period from January 1, 1972 through December 31, 1978 [*sic*, 1979], and the 1975 Memorandum.'
>
> King & Spalding's Response to Plaintiff's First Notice to Produce ¶ 4.

Plaintiff's Reasons for Compelling Further Production

King & Spalding has produced only incomplete copies of its partnership agreements from which information reflecting partnership points and capital contributions

has been censored. In the discussion related to Interrogatories Nos. 1(k) and 1(l) above, plaintiff has explained why information concerning partnership points and capital contributions contained in King & Spalding's various partnership agreements is relevant, and, therefore, discoverable by plaintiff. Although this information is undoubtedly sensitive, this fact does not exempt it from discovery under Rules 26 and 34, particularly in view of the comprehensive protective order entered by the Court on April 23, 1980, *at plaintiff's suggestion.* King & Spalding should be required to produce complete copies of its partnership agreements in effect during the 1972-1979 time period.

In the discussion of plaintiff's interrogatories, plaintiff has explained in detail the relevancy of the information sought by each interrogatory. Since the Rule 34 document request merely asks for production of the relevant documents reflecting the same information, the request is unquestionably proper for the same reasons the interrogatories are proper.

King & Spalding apparently contends that, by describing very *generally* some of its policies and procedures in a self-serving manner in response to an interrogatory, it is entitled to foreclose plaintiff from examining Firm memoranda and other documents which state those same policies and procedures. Since the contemporaneous documents may contain relevant information that is either not disclosed or is obscured by an artful lawyer's answer to the interrogatories—and indeed may even *contradict* some of defendant's answers—plaintiff is entitled under Rule 34 to examine the original documents, and is not re-

quired to accept defendant's self-serving descriptions of their contents.

CONCLUSION

Plaintiff respectfully urges that her motion to compel be granted and that King & Spalding be ordered (1) to answer plaintiff's first interrogatories enumerated above, and (2) to produce complete and uncensored copies of its partnership agreements and of all other documents identification of which was requested in plaintiff's First interrogatories and production of which was requested in plaintiff's First Notice to Produce.

Respectfully submitted,

/s/ Emmet J. Bondurant
/s/ Jeffrey M. Smith

Attorneys for Plaintiff

ORDER

This employment discrimination action under Title VII of the Civil Rights Act of 1964, 42 U. S. C. §§ 2000e-2000e-17, is before the court on the motion of the Equal Employment Opportunity Commission (EEOC) to participate as amicus curiae in this action.

In support of its motion, the EEOC argues that this case presents an important question of statutory construction and that it is in the public interest for the commission to present its views to the court. In addition, the EEOC requests that it be made privy to the entire record in this case, including the material placed under seal by the consent protective order entered April 24, 1980, in order effectively to brief the issues.

Defendant opposes the motion on several grounds. It first argues that, since the EEOC issued an early right-to-sue letter and closed its file without undertaking investigation or conciliation, it should not now be permitted to enter the case. Defendant also argues that plaintiff is already adequately represented in this action and that permitting the participation of the EEOC might lead to disclosure of discovered material that would breach the court's protective order.

The decision whether and to what extent to allow the EEOC to participate in this case as amicus curiae is one within the court's sound discretion. *See, e. g., Alexander v. Hall,* 64 F. R. D. 152, 155 (D. S. C. 1974), and authority cited there.

Under the particular circumstances presented by this case, the court declines to afford the EEOC access to

that portion of the record that is sealed. Both parties are represented by eminently capable counsel who are well able to address the unique issues presented in this lawsuit.

The court welcomes the participation of the EEOC as amicus curiae to the extent that it may wish to address the legal issues involved in this case.

Accordingly, the motion of the EEOC to participate as amicus curiae is GRANTED in part and DENIED in part.

So ORDERED this 30th day of June, 1980.

/s/ Newell Edenfield
United States District Judge

KING & SPALDING'S BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL

NOW COMES KING & SPALDING, a partnership named as defendant in this action, and respectfully submits this Brief In Opposition To Plaintiff's Motion To Compell further answers to interrogatories and the production of additional documents.

ARGUMENT

I. TITLE VII DOES NOT APPLY TO THE ADMISSION TO PARTNERSHIP IN DEFENDANT.

Defendant has moved to dismiss plaintiff's employment discrimination claim for lack of subject matter jurisdiction. Pursuant to the Court's Order of April 23, 1980, the Court limited discovery in this matter to the threshold question of whether admission to partnership in a law firm is subject to review under Title VII. In addressing this issue, there are only two relevant questions: (1) Is a partner an "employee" of the partnership for purposes of Title VII? (2) Is admission to partnership a "term, condition, or privilege of employment" under Title VII? These are, defendant respectfully submits, the only two issues upon which discovery should be allowed at this time. While plaintiff proposes a number of other issues, such as whether defendant is a "constructive corporation," these issues are essentially unrelated to the threshold jurisdictional question before the Court and do not provide a basis for discovery.

The primary source for determining whether Title VII applies to partnership decisions is the statute itself, a source which plaintiff understandably ignores in her latest Brief. The statute speaks solely in terms of *employment* relationships, and prohibits discrimination with respect to (1) "compensation, terms, conditions, or privileges *of employment*," or (2) actions which would "adversely affect his status *as an employee*." 42 U. S. C. § 2000e-2 (emphasis added) The term "employment" is undefined, and the term "employee" is defined simply as one "employed by an employer." 42 U. S. C. § 2000e(f). As it is well established that terms used in a statute without definition are presumed to have their common, everyday meaning, *see U. S. v. National Broiler Marketing Association,* 550 F. 2d 1380, 1386 (5th Cir. 1977), *affirmed,* 436 U. S. 816 (1978); *Addison v. Holly Hill Fruit Products, Inc.,* 322 U. S. 607, 618 (1944), the terms "employee" and "employment" should be given their everyday meanings under Title VII, meanings which clearly exclude partners and admission to partnership.

Just as the statutory language itself belies plaintiff's efforts to classify the partners in defendant as "employees," the legislative history of the Act also indicates that plaintiff's argument is without merit. An exhaustive review of the legislative history of the Act by defendant has disclosed no support whatsoever for plaintiff's assertion that the terms "employee," "employ," and "employment" as used in the Act are intended to embrace partners in a law firm. The only relevant discussion of this issue which defendant has uncovered is a statement by Senator Clark, the Senate manager for the Act, in which Senator Clark explained that the term "employer" was intended to have

its "common dictionary meaning, except as expressly qualified by the Act." 110 *Cong. Rec.* 7216 (April 8, 1964) (copy attached as Exhibit "A").

Relying upon the absence of contrary legislative history, the courts have generally concluded that Title VII's definition of "employment" embraces the general common law concept, and that Congress did not intend for Title VII to apply to relationships which do not meet that standard. *See Dumas v. Town of Mt. Vernon,* 436 F. Supp. 866 (S. D. Ala. 1977), *modified on other grounds,* 612 F. 2d 974 (5th Cir. 1980); *Smith v. Dutra Trucking Co.,* 410 F. Supp. 513 (N. D. Cal. 1976), *affirmed,* 580 F. 2d 1054 (9th Cir. 1977), *cert. denied,* 439 U. S. 1076 (1979). By common law standards, of course, a "partner" is not an "employee" of the partnership. Rather, as the Sixth Circuit explained in *Burke v. Friedman,* 556 F. 2d 867, 869 (7th Cir. 1977):

> "[S]ection 6 of the Uniform Partnership Act defines a partnership as 'an association of two or more persons to carry on as co-owners a business for profit'. . . . Partners manage and control the business and share in the profits and losses. . . . In light of the foregoing, we do not see how partners can be regarded as employees rather than as employers who own and manage the operation of the business."

Accordingly, it is undisputed that both the language and legislative history of Title VII directly contradict plaintiff's position that partners are "employees" and make it absolutely clear that plaintiff's Brief represents nothing less than an invitation to this Court to engage in social engineering and judicial lawmaking. The Supreme Court has recently discouraged such efforts. *Roadway Express, Inc. v. Piper,* 48 U. S. L. W. 4836, 4838-39 (June 23, 1980).

In its responses to plaintiff's discovery requests, defendant attempted in good faith to provide plaintiff with all answers and materials which are relevant to the threshold jurisdictional issue, as discussed below. Defendant did not provide plaintiff with all answers and documents requested in plaintiff's counsel's letter of April 16, 1980, because defendant maintains that many of those interrogatories and requests for production are not related to the two questions identified above, the only questions relevant to the threshold jurisdictional question.

Plaintiff's Brief in Support of her Motion To Compel begins with an extensive discourse upon her view of the purposes of Title VII and an explanation of plaintiff's contentions. While defendant believes that plaintiff's arguments largely ignore the central questions of whether partners are "employees" and whether admission to partnership is a "term, condition, or privilege" of employment, her contentions and arguments require the following response.

1. *Plaintiff's focus upon the "institutional" nature of King & Spalding has nothing to do with the jurisdictional question before the Court.*

Plaintiff's Brief rests upon a classic "straw man" argument. Plaintiff argues at great length that defendant is a legal entity separate from the individual partners of the firm. Indeed, plaintiff suggests that the "crux" of defendant's position in its motion to dismiss is the argument that the firm and its partners are a single entity which cannot be separated. (Plaintiff's Brief, at 6). This is a blatant mischaracterization of defendant's position, and should not provide the basis for further discovery.

Nothing in defendant's Brief in Support of its Motion To Dismiss could reasonably be construed to express the view that, in dealing with outsiders, the firm is indistinguishable from the individual partners, or, as importantly, that this view is at all pertinent to its jurisdictional argument. Defendant is a partnership which exists under Georgia law, and, as such, the partnership is unquestionably an entity separate from the individual partners for many purposes. One need not search the digests of the United States Supreme Court to discover that, under applicable law, a partnership may sue and may be sued, *Ga. Code Ann.* § 75-312, may own property, *Ga. Code Ann.* § 75-101, and must file certain tax returns, § 6031, *Internal Revenue Code of 1954*. Defendant has, at no time, argued that it is not an entity separate and distinct from the individual partners.

Plaintiff somehow leaps from the fact that a partnership is, for some purposes, a legal entity separate from its partners to the assumption that the partnership "employs" the partners, the critical test for determining whether Title VII applies to partnership decisions, and it is in this leap that plaintiff's argument falls short. Nothing inherent in the fact that a partnership is, with regard to dealings with outsiders, an entity separate from the partners implies that the partnership "employs" the partners, any more than the fact that a corporation is separate from its shareholders necessarily implies that the corporation "employs" the shareholders.[1] Title VII only applies to

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[1]A partnership can, of course, employ one of the partners under a management agreement or otherwise. In these exceptional circumstances, however, the salary of the employee is generally treated as an expense of the partnership which is deducted before determining the profit or loss which is shared by the partners *qua* partners.

employment relationships and, as described above, nothing in the Act or its legislative history suggests that a partner has an employment relationship with the partnership. Plaintiff's "separate entity" analysis has absolutely nothing to do with establishing the existence of an employment relationship.

2. *The "economic reality" test of employment urged by plaintiff fails to establish that a law firm partner is an "employee" under Title VII.*

Plaintiff also argues that, even if partners are not employees of the partnership in the common law sense, the "economic reality" of major law firm practice makes a partner the functional equivalent of a corporate employee who enjoys the benefits of a profit-sharing plan. Thus, plaintiff argues that the individual partners of King & Spalding "should be treated as 'employees' of the 'firm' for purposes of Title VII" (Brief at 5).

Relying upon this claim of "economic reality", plaintiff issues a bold invitation to this Court to engage in judicial legislation by asserting not that Title VII applies to partners, but rather that it *should* apply. Thus, plaintiff urges this Court to ignore the definitional provisions of Title VII, 42 U. S. C. § 2000e, and to adopt a broad "remedial" reading of the statute. Such an approach would not only bring business partners within the ambit of Title VII, but would also extend the Act to independent contractors and others who do not traditionally qualify as employees.

Plaintiff has not referred the Court to any authority for the proposition that a partner in a law firm is an "em-

ployee" of a business within the meaning of Title VII, and defendant has already explained that both the statutory language and the legislative history contradict this view. Plaintiff's reliance upon the Fifth Circuit opinion in *Pettway v. American Cast Iron Pipe Co.*, 494 F. 2d 211 (5th Cir. 1974), *rehearing denied*, 494 F. 2d 1296 (1974), is clearly misplaced. While *Pettway* did hold that, pursuant to Title VII, black employees were entitled to an equal right to serve upon the company's Board of Operatives, a co-trustee of the company's stock, the opinion provides no support for plaintiff's contention that the Fifth Circuit intended to hold that Title VII applies to acquisition of an ownership interest *per se*. The members of the Board of Operatives apparently remained operational employees of the company who received a set wage or salary. Moreover, the Board of Operatives was made up *exclusively* of employees. But the members of the Board of Operatives were not the owners of the stock voted, and were elected to serve on the Board on a rotating basis. No reasonable construction of the Fifth Circuit's Opinion supports plaintiff's conclusion that *Pettway* represents an extension of Title VII jurisdiction into the area of ownership of a business. Indeed, the legislative history of the Act clearly indicates that, barring the exceptional circumstances of *Pettway*, the Act does not apply to the election of the Board of Directors of a company, because directors are not "employees," and stockholders are not "employers." *See* 110 *Cong. Rec.* 7218 (April 8, 1964) (copy attached as Exhibit "A"). We submit that the statement of Justice Goldberg in *Bell v. Maryland*, 378 U. S. 226, 313 (1964), that the right of every person to choose his or her business partners on any basis satisfactory to him or her is a constitutionally protected liberty, is still good law.

In *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U. S. 28 (1961), the Supreme Court held that the members of an incorporated cooperative were "employees" within the meaning of Section 3 of the Fair Labor Standards Act of 1938, but the Court pointed out that, under the terms of the Act, the term "employ" includes "to suffer or permit to work." 356 U. S. at 32. This definition of "employ" is clearly broader than the common law standard, and was not adopted by Congress when Title VII was passed.

Moreover, plaintiff's plea to this Court to ignore the common law and to include partners in a law firm as "employees" for Title VII purposes ignores a number of factors which clearly differentiate partners from employees. Partners, for example, stand in a fiduciary relationship with each other, one which legally requires "the strictest good faith" in their dealings with one another. *Ga. Code Ann.* § 75-201. Employees share no such relationship. Partners may, without the approval of any other person, bind the partnership in its dealings with third parties. *Ga. Code Ann.* § 75-302. Employees cannot. Partners have the legal right to examine the books and records of the firm. *Ga. Code Ann.* § 75-202. Employees do not. Partners cannot sue one another for damages arising from partnership transactions, their only recourse against one another being an equitable action for an accounting. *See Miller & Son v. Freeman*, 11 Ga. 654 (1900). Under federal law, "employees" are subject to withholding for taxes, § 3401 *Internal Revenue Code of 1954*, while partners are subject to the self-employment tax provisions of the Code. § 1402 *Internal Revenue Code of 1954*. Each of these distinctions reflects the fact that partners

are owners of the firm, who share in both profits and losses, and therefore cannot be characterized as employees who merely receive a salary for services rendered to the firm.

In light of the clear legal distinctions between partners and employees, and in the absence of any expression of congressional intent to include partners within the statutory concept of "employees", plaintiff's efforts at judicial legislation should be rejected out of hand.

3. *Plaintiff's argument that defendant is a "constructive corporation" has no merit.*

Apparently recognizing the weaknesses in her claim that partners in a law firm are "employees" of the firm, plaintiff devotes a substantial portion of her Brief to arguing that defendant's own organizational structure "closely resembles the organizational structure of ordinary business corporations" (Brief, at 10). As explained earlier, this focus upon the structure of the firm itself has no relevance to the threshold jurisdictional issue before the Court, an issue which necessarily turns upon whether an employment relationship exists *between* the firm and its partners. Moreover, plaintiff's comparison ignores the clear distinction between those carrying out the administrative functions within a corporation where such duties are fulltime, and attorneys carrying out certain administrative functions within a law firm where such activities are collateral to their regular and fulltime law practice.

In support of her argument that defendant is a constructive corporation, plaintiff sets forth eight individual elements which she contends make defendant closely akin

to an ordinary business corporation (Brief, at 10-14). Without arguing each of plaintiff's individual elements, it should be noted that they generally provide no basis for plaintiff's contention that defendant is more akin to a corporation than to a common law partnership, as shown below.

Plaintiff's first argument, that defendant has a written partnership agreement, is of no significance in establishing that the firm resembles a corporation. Under Georgia law, a partnership is inherently contractual in nature, and the Georgia Code specifically recognizes that the contract may be either written or parol. *Ga. Code Ann.* § 75-101. The fact that plaintiff's counsel's firm is small, personal, and unstructured, or that his former firm is large, impersonal, and highly structured, and that each chose to operate under parol rather than written contractual agreements in no way makes either firm more of a true partnership than defendant. Indeed, plaintiff's arguments would lead to the absurd conclusion that defendant's partnership decisions are subject to Title VII while similar decisions by Kilpatrick & Cody, for example, are not. Defendant doubts that any member of Congress ever envisioned this anomalous result.

Plaintiff's arguments that partners in defendant have no true ownership interest in the firm because of the provisions of the partnership agreement dealing with withdrawal and the policies of the firm regarding capital contribution (Brief, at 12-13) are also flawed. It is true that the partnership agreement protects the partnership from a division of firm assets at the time a partner withdraws, but this does not mean that the partner does not own a pro rata portion of the assets while he is a partner. Were

the partnership to vote to dissolve, each partner would receive a pro rata portion of the assets. Such is not true, of course, of a middle-level manager in the corporate context.

Plaintiff's claim that a partner has no true ownership interest in the firm also raises the interesting question of who, according to plaintiff, does own the partnership's assets. There is no stock in the partnership, only partnership interests. Thus plaintiff's argument, if carried to its logical result, would imply that the partnership's assets exist without any owner, an obviously absurd result.

Similarly, plaintiff's argument that defendant's partners are compensated on the basis of seniority (Brief, at 13-14) is both misleading and of no consequence. As defendant explained in its Answers to plaintiff's Interrogatories, compensation for partners is determined on an annual basis by the partnership itself. Response to Interrogatory No. 1(i)). Even if plaintiff's suggestions that partnership "points" are allocated largely upon a seniority basis, that "employees of large impersonal corporations receive periodic raises for seniority, and that government employees progress from GS-9 to GS-11" solely on seniority (Plaintiff's Brief, at page 14) are assumed, arguendo, to be true, these suggestions ignore the critical fact that partners share in both profits *and losses*.

If the federal government incurs a budget deficit, a GS-9 employee still receives his salary, as does a GS-11 employee. Similarly, if a corporation incurs an operating loss, management employees receive their salaries.[2] In

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[2]It should also be noted that higher management in corporations generally receive raises based on performance, not seniority, so this argument is truly specious.

a partnership such as defendant, however, there is absolutely no guarantee that any partner will receive any income whatsoever. As the Court in *Burke v. Friedman* noted, partners share in the profits and losses of the business, and therefore constitute owners, rather than employees. 556 F. 2d at 869. *See Ga. Code Ann.* § 75-102. Within this context, the fact that the degree of participation may be influenced by seniority by no means makes the firm the equivalent of a corporation.

Defendant submits that, had plaintiff truly desired to evaluate whether defendant was a true partnership as opposed to a "constructive corporation", plaintiff would have relied upon some established standard or test for distinguishing a partnership from a corporation, rather than upon the eight arbitrary elements which she discusses without any authority or support. Such an objective standard is set forth in the regulations developed by the Treasury Department dealing with unincorporated associations. *Treas. Regs.* § 301.7701-2. Surely this federal standard is a more appropriate test than the standard created out of whole cloth by plaintiff. The regulations establish that, for tax purposes, an unincorporated organization, such as a partnership, should not be treated as a corporation unless it has more "corporate characteristics" than "noncorporate characteristics." *Treas. Regs.* § 301.7701-2(a)(3). The relevant "corporate characteristics" set forth in the regulations are (1) continuity of life; (2) centralization of management; (3) limited liability; and (4) free transferability of interest. *Treas. Regs.* § 301.7701-2(b)-(e). Applying this four-pronged test to this case, defendant is clearly a true partnership, not a corporation.

There is no question but that there is no "free transferability of interest" on the part of partners in defendant,

particularly as that term is defined within the regulations. *Treas. Regs.* § 301.7701-2(e)(1). Indeed, Georgia law specifically provides that no partner may, by assigning his interest or otherwise, introduce a new partner without the consent of all other partners. *Ga. Code Ann.* § 75-204. Nor is there "limited liability" since the regulations provide that "[a]n organization has the corporate characteristic of limited liability if under local law there is no member who is personally liable for the debts of or claims against the organization." *Treas. Regs.* § 301.7701-2(d)(1). Under Georgia law each partner in Defendant is personally liable for the debts of and claims against the partnership. *Ga. Code Ann.* § 75-103.

It is also clear that defendant does not possess "centralization of management" as that term is used in the Regulations:

> "Centralized Management means a concentration of continuing exclusive authority to make independent business decisions on behalf of the organization which do not require ratification by members of such organization. Thus, there is not centralized management when the centralized authority is merely to perform ministerial acts as an agent at the direction of the principal. *Treas. Regs.* § 301.7701-2(c)(3).

While the Partnership Agreement of defendant does provide for a Management Committee, it should be recognized that the primary duty of the members of the Committee is the practice of law. Service on the Committee is in the nature of a collateral duty, dealing with matters of an administrative and ministerial nature in the operation of the firm. Even as to such matters, the decisions of the Management Committee can be reversed at any time by a 2/3 vote of the participating units of the partnership. (Memorandum of Agreement effective as of January 1, 1978,

¶¶ 7, 14.) Moreover, even if the Management Committee were, with respect to the partnership itself, considered to be a form of centralized management, it would not constitute the centralized management envisioned by the Regulations. Indeed, the Regulations specifically note:

> "[B]ecause of the mutual agency relationship between members of a general partnership subject to a statute corresponding to the Uniform Partnership Act, such *a general partnership cannot achieve effective concentration of management powers and, therefore, centralized management. Usually, the act of any partner within the scope of the partnership business binds all the partners; and even if the partners agree among themselves that the powers of management shall be exclusively in a selected few, this agreement will be ineffective against an outsider* who has no notice of it." *Treas. Regs.* § 301.7701-2(c)(4) (emphasis added).

The Georgia Code specifically provides that, with regard to an outsider, any partner may bind the partnership. *See Ga. Code Ann.* § 75-302. Thus, defendant lacks the centralization of management envisioned by the Regulations. As previously indicated, plaintiff overlooks that the membership of the Management Committee is made up entirely of attorneys whose primary function is the practice of law and who perform in an administrative capacity only collaterally.

Finally, defendant also lacks the characteristics of "continuity of life." While the Partnership Agreement provides that the partnership shall continue despite the withdrawal, incapacity, or death of any partner (Memorandum of Agreement effective as of January 1, 1978, ¶ 5(a)), Georgia law provides that a partnership is dissolved automatically by the addition, withdrawal, or death of one of its partners, *Ga. Code Ann.* § 75-107, and the Treasury Regulations explain:

> "An agreement by which an organization is established may provide that the business will be continued by the remaining members in the event of the death or withdrawal of any member, but such agreement does not establish continuity of life if under local law the death or withdrawal of any member causes a dissolution of the organization. Thus, there may be a dissolution of the organization and no continuity of life although the business is continued by the remaining members." *Treas. Regs.* § 301.7701-2(e)(2).

Based on this authority, defendant submits that it lacks continuity of life.

In summary, defendant lacks the four corporate characteristics which, for federal tax purposes at least, have long determined whether an unincorporated organization should be considered to be a partnership or a corporation. Under these circumstances, plaintiff's attempt to substitute an arbitrary standard, without authority or support, for determining whether the firm is a true partnership should be rejected, and the Court should conclude, as a matter of law, that defendant is a partnership for all purposes, and that partners are owners of the firm, not employees.

4. *Plaintiff's argument that admission to partnership is a privilege, term, or condition of employment should be rejected.*

In its Brief in support of its Motion To Dismiss, defendant explained that considering admission to partnership to be a term, condition, or privilege of employment is meaningless unless Title VII also applies to the relationship and interactions among the partners. (Defendant's Brief, at 15). Absolutely nothing in plaintiff's Brief responds to this point. Rather, plaintiff focuses upon an extension of the proposition that the "prospect for promo-

tion" may constitute a term or condition of employment. Clearly, so long as the employee remains an employee, this is true. As explained earlier, however, admission to the partnership is not a promotion within the employment context. Rather, the employee, upon admission to the partnership, ceases to be an employee and becomes an owner in the firm. The NLRB cases cited by plaintiff, which deal with promotion from one employment position to another employment position, are wholly inapplicable to this case.

5. *The termination of plaintiff's employment pursuant to defendant's facially neutral long-standing policies does not provide a basis for jurisdiction over the partnership claim.*

Apparently forgetting that the issue before the Court at this time is limited to whether or not a refusal for any reason to change plaintiff from the status of an associate (employee) to that of a partner (employer) is within the scope of Title VII, plaintiff indulges in such prejudicial language as referring to being "involuntarily terminated" from her employment as an associate of the defendant law firm. Plaintiff knows full well that, like all associates of defendant, she had only a contract at will under Georgia law, which could be terminated at any time, with or without cause, by either party. In any event, that issue is not before the Court at this time.

Plaintiff contends that her employment was involuntarily terminated under defendant's established policy that an associate who is denied admission to the partnership is expected to eventually leave the firm, and contends that her termination provides a basis for this Court's jurisdiction over her partnership claim. We submit that this argument is without merit. This argument does not ad-

dress the question of whether Title VII coverage extends to partnership admission decisions. It only addresses the validity of defendant's "up or out policy." There is in plaintiff's Brief, however, no allegation that the termination of her employment was in itself discriminatory. Indeed, plaintiff directly acknowledges that the policy pursuant to which she was terminated is an established policy of the firm which is applied on neutral terms (Plaintiff's Brief, at 1), and that the very same policy affected two male associates in her own class. Certainly this argument does not justify an expansion of Title VII jurisdiction.

Furthermore, the Supreme Court has established that a facially neutral policy which gives present effect to a discriminatory decision does not, in and of itself, provide the basis for Title VII jurisdiction over that decision. *See United Airlines v. Evans*, 431 U. S. 553 (1977). Plaintiff seeks to invoke the jurisdiction of this Court solely because of a policy which is neutral in its operation but which, according to plaintiff, gave effect to a past act of discrimination. The *Evans* court specifically rejected such an argument, and plaintiff offers no reasons why *Evans* does not control her contention as well.

II. RESPONSE TO INDIVIDUAL ASPECTS OF MOTION TO COMPEL.

There is no justification for plaintiff's assertion that defendant has effectively "stonewalled" plaintiff's discovery requests. While objections have been asserted to a number of plaintiff's interrogatories, defendant has, subject to the objections, made answers to the appropriate interrogatories. The precaution of asserting such objections before answering is born of experience. Should

there arise an issue as to what was answered, at least there can be no contention that defendant has waived all objections to the interrogatory in question. As discussed below, the objections asserted by defendant are well-founded.

Moreover, we submit that there is no merit in the contention that defendant has submitted only "abridged" copies of the firm's partnership agreements. Even a cursory examination will disclose that the only omissions deal with the percentages of the profits allocated to the various partners, the percentages of capital contributions, the cost of certain remodeling of the firm's offices, and the names of two partners who had withdrawn from the firm. Defendant submits that such omissions deal with purely personal and private matters that obviously have no relevancy to the issue before the Court. In order to allay the concerns of opposing counsel, however, we tender with this Brief complete and unabridged copies of the partnership agreements in question for an *in camera* examination by the Court, with the understanding that if the Court deems such items to be in any way relevant to the issues before it, then these documents may be delivered to opposing counsel with no objection on the part of defendant.

1. *Defendant's General Objection No. 1 is well-founded.*

General Objection No. 1 indicates that discovery in this matter should be limited to the "Time Period" defined in plaintiff's interrogatories, i.e., 1972 to 1979. This limitation would, under any interpretation, allow plaintiff to obtain discovery of facts and events which occurred six years prior to the allegedly discriminatory event in

this case. Plaintiff suggests, without citing any authority, that such a limitation is unreasonable. Defendant submits that this limitation is in accord with generally recognized principles in Title VII litigation.

In *Georgia Power Co. v. EEOC*, 295 F. Supp. 950 (N.D. Ga. 1968), *affirmed*, 412 F. 2d 462 (5th Cir. 1969), Judge Smith limited discovery in a Title VII action to a five-year period prior to the alleged violation of the Act. In explaining this limitation, Judge Smith wrote:

> "Timewise there should be reasonable limitations also . . . whatever was done ten, twenty, or thirty years ago by an established company could not illustrate the violation of this new right created by Congress in 1964, nor would statistics of such age and vintage have relevancy or probative value. In such circumstances, the Court limits the demand to a five-year period prior to the alleged violation. Any date thus fixed is admittedly arbitrary. However, such period is deemed to be reasonable for the normal case absent some special showing of the need and relevancy of a longer period." 295 F. Supp. at 954.

Other cases have adopted this five-year rule, or a variation thereof. *See Cormier v. PPG Industries, Inc.*, 452 F. Supp. 594 (W.D. La. 1978) (five-year time limit); *Shelton v. Pargo, Inc.*, 13 F. E. P. Cases 1736 (W.D. N. C. 1976) (five-year limitation on general discovery, but allowing plaintiff to discover when blacks were hired into particular job lines); *Queen v. Dresser Industries*, 21 F. E. P. Cases 758 (D. Md. 1977) (upholding defendant's objection to providing information for the period prior to 1970); *EEOC v. Magnetics Division of Stang Industries*, 13 F. E. P. Cases 191 (W.D. Pa. 1976) (3½ year limitation on discoveries). In this case, plaintiff has made absolutely no showing of special need which would

justify an extension of the discovery period beyond the reasonable time period developed by Judge Smith. Plaintiff was the first female to be considered for partnership in the firm, and the one female associate employed by the firm prior to plaintiff was employed under unique conditions. Even if the Court were to determine that discovery with regard to this former employee's experiences with the firm were to be allowed, plaintiff is by no means entitled to general discovery regarding defendant's policies and practices prior to 1972.

2. *Defendant's General Objection No. 2 is well-founded.*

General Objection No. 2 is simply an objection to "identifying" documents in the context of the interrogatories, since plaintiff also requested that each document be produced. Plaintiff's Brief in support of her Motion To Compel appears to agree that such identification is not necessary if the documents are produced. (Brief, at 10). To the extent that the interrogatories answered by defendant called for the identification of documents, they were either identified or produced. For example, defendant identified the minutes of its partnership meetings and management committee meetings which exist, although defendant objected to the production of these documents. In short, defendant does not believe that there is any dispute at all on this issue.

3. *Plaintiff's Objection to Defendant's General Objection No. 3 can be resolved.*

Defendant has objected to the identification or production of any document protected from discovery by the attorney-client privilege and the work-product doctrine.

Defendant agrees with plaintiff that a defendant may not simply refuse to produce a privileged document without identifying the document sufficiently to allow plaintiff to contest the claim of privilege. Accordingly, defendant will agree to provide, through separate, confidential letter to plaintiff's counsel, with a copy to the Court, an identification of any document with regard to which defendant is claiming either the attorney-client privilege or protection of the work-product doctrine.

4. *Defendants objection to Interrogatories No. 1(c) and (d) is sound.*

Interrogatories 1(c) and 1(d) seek information about events which occurred and materials which might have been produced prior to 1972. As explained above, defendant submits that discovery should be limited to the period from 1972 to 1979. Moreover, the only ground set forth by plaintiff in support of her request for the information sought in 1(c) and (d) is that the answers might reveal that defendant has an institutional identity separate from that of the partners. As explained above, defendant does not contest that it has an identity separate from that of its partners. This identity, however, is wholly irrelevant to the question of whether a partner is an "employee" of the firm for purposes of Title VII.

5. *Defendant's response to Interrogatory No. 1(f) is appropriate.*

Defendant did not object to Interrogatory No. 1(f). Rather, defendant incorporated its response to a prior interrogatory, Interrogatory No. 1(e)(1). That response provided plaintiff with the information requested. Defendant submits that there is no dispute on this matter.

6. *Defendant's objections to Interrogatories Nos. 1(h), (i), and (j) should be sustained.*

Interrogatories Nos. 1(h) and (i) requested that defendant describe its "organizational structure" and provide certain information with regard to each committee, department, or administrative position of the firm. Interrogatory No. 1(j) sought the identification of minutes or documents maintained by the firm or its committees or departments. Defendant did provide plaintiff with substantial information regarding the structure of the firm, and identified the minutes which are maintained. Plaintiff submits, however, that a further response should be compelled and, in support of her contention, sets forth five arguments. Defendant responds to those arguments as follows:

(a) Despite plaintiff's protestations, a request that a business describe its "organizational structure" is vague. To the extent that plaintiff wants information regarding committees, departments, and administrative positions, as her interrogatories specifically requested, that information has, in large measure, been provided. To the extent that "organizational structure" implies something other than committees, departments, and administrative positions, defendant does not understand the term, and plaintiff has not attempted to explain it.

(b) Plaintiff's claim that defendant should be required to identify the members of its management committee prior to 1978 is an appeal to this Court to allow discovery on the merits. Indeed, plaintiff specifically alleges that those persons may have recollections of facts "pertaining to the operations, poli-

cies, structure and reporting relationships and procedures for selecting and admitting partners and determining their compensation". (Brief, at 27). These are matters which relate to the merits of plaintiff's claim, not to the threshold jurisdiction question upon which the Court has ordered discovery.

(c) Plaintiff's third and fourth arguments request this Court to compel the identification of documents defining the firm's administrative structure or constituting records maintained by a committee, department, or administrative partner of the firm. (Brief, at 27). Plaintiff's only reason for seeking such production is that the documents might show that defendant is managed and operates like a corporation. As explained earlier, the test of "centralized management" for determining whether an organization is a partnership or a corporation is one which rests on the duties and responsibilities of the partners and the partnership to outsiders, not internal agreements or procedures. *Treas. Regs.* § 301.7701-2(c)(4). Accordingly, plaintiff's contention that materials relating to committees and department might show that defendant is managed and operated like a corporation is without merit.

(d) Plaintiff's request for access to the minutes of the Management Committee and the partnership as a whole is also without merit. Plaintiff asserts that those minutes may reflect that the Management Committee makes virtually all of the decisions of the firm. Again, however, the test of centralized management is one which depends upon the relationship of the firm to outsiders, not agreements made by the

partners themselves. Accordingly, while defendant has advised plaintiff that minutes of the Management Committee and the partnership exist, the contents of those minutes are in no way relevant to plaintiff's "coverage" claim.

7. *Defendant's objections to Interrogatory No. 1(k) should be sustained.*

Interrogatory No. 1(k) requests detailed information regarding a new partner's capital contribution, the percentage of ownership of the assets of the firm acquired by a new partner, and the percentage of firm capital or assets which a new partner is entitled to receive upon withdrawal from the firm. Plaintiff asserts that this information is required to allow her to demonstrate that a new partner is not an "owner" of the firm. As explained earlier, the logical extension of plaintiff's argument is that no one owns the firm's assets, an absurd result. Moreover, the alternative proposed by plaintiff, that a partner is in fact an "employee" of the firm whose compensation is allegedly no more than a "salary" ignores the critical facts that a partner shares in both profits and losses. Under these circumstances, the amount of money contributed by an incoming partner and the percentage of ownership of the assets of the firm acquired by an incoming partner are wholly irrelevant to this litigation.

8. *Defendant's objection to Interrogatory No. 1(l) should be sustained.*

Interrogatory No. 1(l) requests detailed information regarding the procedures used by defendant to determine the compensation of partners. Plaintiff asserts that this

information is relevant to allow her to demonstrate that defendant's compensation system is very similar to the "impersonal seniority-based systems used by the federal government and many corporations to compensate their employees . . ." (Brief, at 31). As pointed out earlier, plaintiff's argument is inherently flawed. A partner shares in the profits *and losses* of the partnership. Thus, if the firm has no profit, a partner receives no income. Similarly, if the firm sustains a loss, each partner is responsible for his proportionate share of the loss. This sharing in losses distinguishes the partnership from any corporation or the federal government. Moreover, this critical distinction separates the partners from associates. Plaintiff's Brief in Support of her Motion to Compel, however, totally ignores this critical fact.

Plaintiff's suggestion that defendant created a new category of partners in 1979 who received a "less-than-full allocation" of partnership points also has no relationship whatsoever to the threshold question before the Court. Regardless of how many points an individual partner has, he still participates, to the extent of his points, in the profits *and losses* of the corporation. The fact that one partner has fewer points than another may reduce his income and his risk of loss, but it by no means renders this individual an "employee" of the partnership.

9. *Defendant's objection to Interrogatory No. 1 (m) should be sustained.*

Responding to Interrogatory No. 1(m), defendant acknowledged that it maintains professional malpractice insurance. Plaintiff asserts that she is entitled to know the monetary limits of such policies and argues that these

limits may demonstrate that the firm has eliminated the risk of unlimited liability for partners. This argument, however, only applies to those liabilities deriving from acts or omissions of the firm's attorneys in providing legal services. Unlimited liability for the debts and obligations of the partnership, such as the payment of associate salaries, would remain intact despite the amount of malpractice insurance maintained by the firm. It is this unlimited liability for the debts and obligations of the business which separates a partnership from a corporation and distinguishes the partners of the firm from the shareholders of a corporation. Furthermore, the existence of insurance coverage for malpractice by a partner affords no comfort to partners concerned about their professional reputation. Client relations and the growth of the firm are more related to the reputation and abilities of the partners than to the monetary limits of malpractice insurance. Accordingly, the amount of malpractice insurance maintained by the firm cannot in any way demonstrate that unlimited liability of partners does not exist, or that this fact should affect the scope of Title VII.

10. *Plaintiff is not entitled to identification of the documents requested in Interrogatory No. 5.*

Interrogatory No. 5 requests defendant to identify documents relating to a large number of categories, including evaluations of associate performance, criteria for advancement to partnership, compensation policies for legal personnel, and others. Defendant objected to the interrogatory on the grounds that it related to the merits of the action. In her Motion To Compel, plaintiff asserts that these documents might reveal that defendant's de-

cision-making process is "institutionalized and impersonal". Assuming *arguendo* that the documents would reveal an institutional and impersonal process, which Defendant denies, the process would nonetheless be that of a partnership, as demonstrated above. Plaintiff's discussion with regard to this interrogatory, as clearly as any aspect of her Brief, demonstrates the manifest confusion in plaintiff's mind over what constitutes a partnership and what characterizes the relationship among partners. None of the documents requested in Interrogatory No. 5 would demonstrate in any way that the partners in defendant do not participate in the profits and losses of the partnership and, absent such a demonstration, the documents could in no sense demonstrate that a partner is an "employee" of the firm.

With regard to Interrogatory No. 5(e), which seeks documents relating to equal employment practices of the firm, plaintiff's contention that such document might contain relevant admissions of fact or law is without merit. The question of whether Title VII extends to a legal partnership is one of subject matter jurisdiction. No admission by defendant could possibly confer jurisdiction upon this Court if Title VII itself does not confer such jurisdiction. Moreover, defendant submits that any internal documents related to equal employment practices are confidential and proprietary and are not subject to discovery. *See Banks v. Lockheed-Georgia Co.*, 53 F. R. D. 283 (N.D. Ga. 1971); *Sanday v. Carnegie-Mellon University*, 12 F. E. P. Cases 101 (W.D. Pa. 1975).

11. *Defendant should not be required to answer Interrogatories Nos. 6 through 8 in further detail.*

Interrogatories Nos. 6 through 2 of plaintiff's First Interrogatories relate to the question of whether defendant is a person engaged in industry affecting commerce. It is defendant's understanding that this Court's Order of April 23, 1980 limited discovery to the question of whether admission to a partnership was subject to jurisdiction under Title VII, a question to which Interrogatories 6 through 8 are unrelated. Moreover, even if plaintiff is entitled to a response to Interrogatories 6 through 8, an adequate response is provided by defendant in its answer to Interrogatory 8(a). Defendant's argument that it is not a person engaged in an industry affecting commerce is based upon the fact that the provision of legal services is a "profession," not an "industry". None of the information requested by plaintiff's Interrogatories 6 through 8 relates at all to this argument, but instead relates to how active defendant is in practicing its profession.

12. *Defendant's objection to Interrogatory No. 10 should be sustained.*

Interrogatory No. 10 seeks detailed information with regard to defendant's policy of not employing permanent associates. Plaintiff's Brief in support of her Motion To Compel clearly demonstrates that this information is only relevant to the *merits* of her underlying claim. Indeed, plaintiff argues that she is "entitled to discovery as to the facts or details of defendant's 'up-or-out policy' for the purpose of demonstrating how that policy was applied

and, thus, supporting her contention that termination of her employment was caused by defendant's decision to refuse to admit her to partnership on the basis of sex. . .". Since the information requested in Interrogatory No. 10 can only be relevant to the merits of plaintiff's claim, discovery of the information is improper at this time.

13. *Defendant should not be compelled to produce further documents.*

Defendant has produced copies of its Partnership Agreements to plaintiff's counsel omitting only the information regarding individual partnership points and capital contributions. In its answers to interrogatories, defendant also identified other documents, including the minutes of the partnership and the minutes of the Management Committee. Defendant has explained above that information regarding capital contributions, partnership points, and the contents of the minutes of the Management Committee and partnership are not relevant in any way to the threshold question of whether Title VII applies to admission to the partnership, and plaintiff's Brief provides no reasons for ordering the production of these documents.

Moreover, plaintiff's suggestions that defendant should be required to produce every document which it has identified is spurious. Defendant has identified certain documents because the fact that the documents *exist* might, in one way or another, relate to plaintiff's contention that the firm operates and functions like a corporation. The contents of those documents, however, is highly sensitive material and defendant submits that it should

not be obligated to produce the documents themselves unless and until plaintiff makes at least a *prima facie* showing that the firm is a "constructive corporation", and that this fact has some relevance to the threshold jurisdictional issue. Clearly, no such showing has been made at this time.

CONCLUSION

Plaintiff's Motion To Compel reflects the erroneous belief that a partnership somehow loses its identity as an organization in which the owners share in the profits and losses when the partnership reaches a certain size or gains a certain degree of structure. Defendant does not contest that, in dealing with outsiders, the firm is a legal entity separate and distinct from the individual partners, and plaintiff's assertion that broad-ranging discovery is necessary to prove this fact is accordingly without merit. This fact, however, has nothing to do with the threshold jurisdictional question of whether Title VII applies to the admission to partnership, a question which depends upon whether an employment relationship exists between partners and the firm. Plaintiff has asserted that the Act applies because partners in a law firm are "employees" for purposes of the Act. This contention, which defendant submits is contrary to the statutory language of the Act and the established principles of law defining the partnership relationship, is the only issue upon which discovery should proceed at this time. For this reason, defendant respectfully submits that plaintiff has been provided with the answers and documents to which she is

presently entitled and plaintiff's Motion To Compel Discovery should therefore be denied.

Respectfully submitted,
LOKEY & BOWDEN
/s/ Hamilton Lokey
/s/ Gerald F. Handley

Attorneys for Defendant,
KING & SPALDING

MOTION OF EQUAL EMPLOYMENT OPPORTUNITY COMMISSION FOR MODIFICATION OF COURT ORDER GRANTING LEAVE TO PARTICIPATE AS *AMICUS CURIAE*.

The Equal Employment Opportunity Commission moves for modification of the court's order, dated June 30, 1980, which allows the EEOC to file a brief *amicus curiae* in this case but actually prevents it from giving meaningful assistance to the Court by denying all access to discovery. The Commission, in lieu of access to the entire record, moves for permission to obtain certain information—detailed below—crucial to the preparation of a brief.

MEMORANDUM IN SUPPORT

The issue before this court—whether Title VII prohibits discrimination with respect to promotion to partnership in a large law firm—requires factual analysis. As we intimated in our reply to King & Spalding's opposition, several theories of liability exist. Under *Lucido v. Cravath, Swaine & Moore*, 425 F. Supp. 123 (S.D.N.Y. 1979), liability may be predicated on facts adduced through discovery concerning Ms. Hishon's reasonable expectations for partnership consideration. In that case, the court cited plaintiffs' reliance on the firm's stated policy—which consisted of fairly considering associates for partner, hiring partners exclusively from within the firm, and discharging associates passed over for partner—to find the opportunity for promotion one of the "terms, conditions, or privileges of employment" or an "employment

opportunity" as to which Title VII prohibits discrimination. Alternatively, it may be argued that all King & Spalding partners are, in effect, employees, or that a newly selected partner holds a position at King & Spalding more consistent with the status of employee than of co-owner /co-manager of the firm. The feasibility of these arguments depends on factual analysis of information to which the Commission is not now privy, *e.g.*, the partnership's mode of operation and the difference, if any, between "junior" and "senior" partners in terms of responsibility, authority, compensation, tenure, and power.

Accordingly, we ask that we be allowed access to materials which reveal the following:*

1. King & Spalding's partnership agreement.
2. The responsibility, authority, compensation, and tenure of newly admitted and senior partners, respectively.
3. King & Spalding's stated criteria for selecting partners.
4. King & Spalding's stated policy regarding the length of time new associates are employed before being considered for partner.

---

*The mode of access, of course, is committed to the court's discretion. The court may order King & Spalding to provide the information directly. Alternatively, if the information has been elicited from King & Spalding through answers to similar interrogatories or requests for documents, it is sufficient if the court authorizes access to copies in the possession of Ms. Hishon's counsel.

5. The mechanism by which King & Spalding selects partners, *e. g.*, by consent of all partners or by vote of a committee.

6. To the extent King & Spalding denied Ms. Hishon's allegations in her complaint, the firm's statement as to what representations were made to Ms. Hishon at the time of her initial interview and recruitment regarding opportunity for admission to partnership.

7. King & Spalding's stated policy regarding partnership selection, *e. g.*, whether it is firm policy to select partners exclusively from among associates employed at the firm and to terminate associates who are formally considered and rejected, for admission to partnership.

While we do not doubt the ability of private counsel to litigate this case effectively, we submit that the public interest in the question posed here—whether Title VII is powerless to prevent discrimination in partnership selections—requires that the Commission exercise its unique expertise and responsibility by providing the court with a meaningful complete answer. *See* Rule 24(b) (2), FED. R. CIV. P.; §§ 705(g) (6), 706(f) (1) of Title VII, 42 U. S. C. 2000e-4(g) (6), 5(f) (1). Allowing the Commission to do so will not prejudice the confidentiality which the parties seek to preserve. Only EEOC attorneys Prager and Reilly will examine King & Spalding's responses to the above inquiries, and the Commission's brief will be seen only by those persons identified in our previously filed reply.

If the court grants this motion, the Commission seeks permission to file its brief 30 days after the date of the

modified order or on the date established for the filing of plaintiff's brief, whichever is later.

Respectfully submitted,

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July 11, 1980

DEFENDANT'S RESPONSE TO THE MOTION OF EQUAL EMPLOYMENT OPPORTUNITY COMMISSION FOR MODIFICATION OF COURT ORDER GRANTING LEAVE TO PARTICIPATE AS AMICUS CURIAE

We submit that the Equal Employment Opportunity Commission has asserted no valid reason for this Court to modify its order of June 30, 1980 in order to make discovery in this case available to the commission. It is immediately apparent that the commission in its numbered requests for discovery goes far beyond what might be relevant to the threshold question of subject matter jurisdiction and seeks discovery as to the merits, contrary to this Court's order limiting discovery until the threshold issue is resolved. In this connection there is an interesting parallel between what the commission seeks and what the plaintiff seeks in discovery. Plaintiff has a right to be partisan. We question the "public policy" involved in the commission's partisanship. Apparently the commission is not interested in the basic legal question "Is admission to partnership covered by Title VII?" but rather in the question "Is admission to partnership at King & Spalding covered by Title VII?"

We submit that not only should the commission's motion for access to discovery be denied, but also the Court's permission for the commission to file a brief amicus curiae should be withdrawn because of developments in this matter since the commission filed its original motion to intervene, to-wit:

On June 24, 1980, plaintiff Hishon filed with the EEOC two further complaints of discrimination against defendant, contending that she was dismissed from her employ-

ment with defendant in retaliation for her filing her original complaint with the commission and that in further retaliation settlement negotiations relative to her original complaint were terminated. While defendant categorically denies both charges, and contends that the complaints are false and groundless, nevertheless the charges are pending before the commission which must, at least in theory, "exercise its unique expertise and responsibility" to act as the impartial arbiter of that dispute. The commission should not be permitted to wear two hats at the same time —(1) as judge of the plaintiff's claims before the commission and (2) as prosecutor of the plaintiff's claims before this Court.

Clearly there is a conflict of interest here, contrary to the ethical standards of the legal profession.

We submit that the motion of the commission to modify the Court's order of June 30, 1980 should be denied and that instead the permission heretofore granted to the commission to file a brief amicus curiae should be withdrawn.

Respectfully submitted,

LOKEY AND BOWDEN

By: /s/ Hamilton Lokey
/s/ Gerald F. Handley
Attorneys for Defendant

ORDER

This employment discrimination action is before the court on a motion by the Equal Employment Opportunity Commission (EEOC) for modification of the court's order of June 30, 1980. That order granted the EEOC's motion to participate in this action as amicus curiae, but denied it access to the non-public portion of the record. The EEOC now moves the court to grant it access to certain specified non-public information in the record, including defendant's partnership agreement, partners' compensation, various policies relating to partnership selection, and partners' responsibility, authority and tenure. Movant argues that it requires this information in order effectively to prepare a brief in this case. Defendant has filed a brief opposing this motion.

Although the court is sympathetic to the arguments advanced by the EEOC, the information sought to be disclosed through this motion is simply too sensitive for the court to permit an enlargement of its protective order in this action, absent defendant's agreement. Since defendant has vigorously opposed the EEOC's attempt to gain access to this information, it is clear that such agreement will not be forthcoming. The parties to this action have consented to placing the record under seal, and that agreement will not be disturbed absent a compelling justification.

In its brief the EEOC has cited Rule 24(b) (2) and several sections of Title VII, relating to its authority to seek permissive intervention in this action, as authority for enlarging the scope of the protective order. Those citations are inapposite to the EEOC's attempt to involve

itself in this action, however, since it has never sought to intervene but has only offered its services to the court as amicus curiae. For this reason, the court has not considered whether the EEOC should be permitted to intervene, under the guidelines appropriate to that determination, *see, e. g., United States Postal Service v. Brennan,* 579 F. 2d 188 (2d Cir. 1978), but only whether and under what conditions it may advise the court on the legal issues in this case. As noted in the order of June 30, 1980, that decision is within the court's sound discretion and it has exercised that discretion in a manner that it believes comports with its responsibilities to the parties to this action and to the public at large.

For the foregoing reasons, the EEOC's motion to modify the court's order of June 30, 1980 is DENIED.

So ORDERED, this 30th day of July, 1980.

/s/ Newell Edenfield
United States District Judge

UNITED STATES DISTRICT COURT

for the

NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action File No. C80-326A

ELIZABETH ANDERSON SISHON

vs.

KING & SPALDING

JUDGMENT

This action came on for consideration before the Court, Honorable NEWELL EDENFIELD, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

It is Ordered and Adjudged that plaintiff take nothing, that action be dismissed for lack of subject-matter jurisdiction and defendant KING & SPALDING recover of the plaintiff ELIZABETH ANDERSON HISHON its costs of this action.

Dated at Atlanta, Georgia, this 26th day of November, 1980.

BEN H. CARTER
Clerk of Court

By: /s/ Sheryl C. Holloway
Deputy Clerk

FILED AND ENTERED IN CLERK'S OFFICE
November 26, 1980
BEN H. CARTER, CLERK
By: /s/ Sheryl C. Holloway
Deputy Clerk

Supreme Court, U.S.
FILED
DEC 29 1982
ALEXANDER L. STEVAS
CLERK

No. 82-940

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ELIZABETH ANDERSON HISHON,
Petitioner,

vs.

KING & SPALDING,
Respondent.

On Certiorari To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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December 28, 1982

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QUESTION PRESENTED

Whether the Eleventh Circuit correctly determined that a law firm partnership's decisions regarding its partners are not subject to review under Title VII of the Civil Rights Act of 1964.

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STATEMENT OF THE CASE

The Eleventh Circuit's opinion, which is reproduced at pages A-2 through A-5 of Appendix A to the Petition, contains a concise statement of the relevant facts and the proceedings in the District Court, 678 F.2d at 1024-26. Respondent respectfully

submits that this statement is more accurate, dispassionate, and balanced than Petitioner's statement.[1]

REASONS FOR DENYING THE WRIT

Stripped of its appeals to passion and demagoguery, the Petition requests that this Court address a simple question of statutory construction of Title VII, despite the absence of a conflict in the Circuit Courts and despite the fact that, in the eighteen year history of Title VII litigation, the question has arisen only twice. Respondent respectfully submits that the Petition should be denied for the following reasons.

First, there is no conflict among the Circuit Courts as to whether Title VII applies to a partnership's determinations regarding its partners. *The decision below is the only decision by a Circuit Court to address this issue.* Moreover, the only other Circuit Court to consider whether partners are "employees" of a partnership for the purpose of Title VII, the central tenet of Petitioner's argument, has concluded that they are not. In *Burke* v. *Friedman,* 556 F.2d 867 (7th Cir. 1977), the Seventh Circuit explained its conclusion that the partners of an accounting firm could not be considered "employees" of the firm as follows:

---

[1] The highly misleading nature of Petitioner's summary of the proceedings below is reflected in Petitioner's statement that "[t]he district court imposed a stay on merits discovery" and "restricted" discovery to the threshold jurisdictional issue. Petitioner, at 5. Remarkably, Petitioner omits the fact that *the stay on merits discovery was initially suggested by her counsel* in a letter to the District Court, a fact noted by the Eleventh Circuit. 678 F.2d at 1025, n.4 (App. A-4). Indeed, it was only after this suggestion from Petitioner's counsel's that, as the Eleventh Circuit explained, "*the parties and the District Court mutually agreed to limit initial discovery* to information needed to determine the jurisdictional issue of Title VII." 678 F.2d at 1025 (App. A-5) (emphasis added).

> "[S]ection 6 of the Uniform Partnership Act defines a partnership as 'an association of two or more persons to carry on a business for profit.' *Partners manage and control the business and share in the profits and losses.... In light of the foregoing, we do not see how partners can be regarded as employees rather than as employers who own and manage the operations of the business.*"
>
> 556 F.2d at 869
> (emphasis added).

In its decision in this case, the Eleventh Circuit expressly endorsed this reasoning of the Seventh Circuit. 678 F.2d at 1027 (App. A-10).

Second, despite Petitioner's allusions to historical discrimination in the legal profession, the virtual absence of litigation of this issue under Title VII establishes that the question of whether the statute applies to partnership determinations is not a matter of great moment to persons other than the parties to this suit. Title VII has been the law of the land for almost two decades, and the Act has generated an explosion of litigation. Nonetheless, the question of whether partnership determinations are subject to review under Title VII has, to the best of Respondent's knowledge, arisen in only one other case, *Lucido v. Cravath, Swaine & Moore*, 425 F.Supp. 123 (S.D.N.Y. 1977). The *Lucido* case has subsequently been dismissed, and Respondent knows of no case pending in either the District Courts or the Circuit Courts in which this issue has been raised. Given these facts, Respondent respectfully submits that the historical vignettes and statistics fashioned by Petitioner have no bearing on the question of whether the Court should issue a writ of certiorari in this case.

Third, the Eleventh Circuit's decision correctly resolved the issue of whether Title VII applies to the partnership determina-

tions of Respondent. The Eleventh Circuit addressed virtually all of the substantive arguments raised in the Petition and Respondent will not attempt to summarize the cogent reasoning of Circuit Judge Fay's opinion. The conclusion of the Eleventh Circuit that the issue raised by Petitioner is ultimately "a single narrow issue" of statutory construction, however, should be emphasized. 678 F.2d at 1026 (App. A-5). While this Court has often stated that Title VII should not be narrowly construed, the Court has never suggested that the boundaries of the statute, where clear, should be ignored. Title VII was enacted to redress *employment* discrimination. The statute outlaws discrimination with respect to "compensation, terms, conditions, or privileges *of employment,*" and actions which would "adversely affect his status *as an employee.*" 42 U.S.C. §2000e-2 (emphasis added). The statute was not designed to protect or define the relationships among partners who are owners *and thus employers.*[2] Indeed, Circuit Judge Tjoflat, in his dissent, recognizes that "Title VII would not apply to the discrete decision whether to take on a new partner...", 678 F.2d at 1030 (App. A-16), thereby rejecting the prime thesis of plaintiff's argument.

Faced with statutory language which cannot be stretched to cover her claim, Petitioner urges the Court to endorse a pure legal fiction: That, despite Respondent's being treated as a true partnership and the partners as owners-employers of the firm for all other purposes of federal and state law, for purposes of Title VII Respondent should be treated as a corporation and the partners as middle-management employees. Neither the District

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[2] In her Charge of Discrimination filed with the E.E.O.C., Petitioner recognized that partners are "employers" rather than "employees" under Title VII. Petitioner individually named each of the partners as a respondent to the Charge and alleged that "each of [the partners] is my employer." (R. 14).

Court nor the Eleventh Circuit found any basis for accepting this bold invitation for judicial legislation. Indeed, the Eleventh Circuit expressly rejected Petitioner's contention that, through its written partnership agreement and management structure, Respondent "has unbeknownst to itself incorporated its partnership." 678 F.2d at 1026 (App. A-7).[1]

While the Eleventh Circuit recognized the "alluring quality" of Petitioner's arguments, 678 F.2d at 1026 (App. A-6), after carefully analyzing the language, legislative history, and case law, the Court held that "[t]he partnership is the appellant's employer; the partners own the partnership; they are not its 'employees' under Title VII." (App. A-10). The conclusion of the Eleventh Circuit in this regard is particularly enlightening:

> "We find a clear distinction between employees of a corporation and partners of a law firm. In making this distinction, we do not presume to exalt form over substance. In

---

[1] Petitioner also argues that the Court should consider partners to be "employees" because the E.E.O.C. supports this view. (Petition, at 21). This is not, however, a case where the E.E.O.C. has exercised its authority to promulgate a regulation after study and public comment, but instead is a case where the E.E.O.C. has expressed a view unencumbered by investigation or facts. The E.E.O.C. *specifically declined* to review both Petitioner's Charge of Discrimination and subsequent Amended Charge and failed to exercise its statutory duty to conciliate the claims of Petitioner. The *amicus curiae* brief filed in the Court below was therefore filed without access to either an investigative file or the record in this case. (Petition, at 5 n.3). This Court has recently explained that "the thoroughness, validity, and consistency of an agency's reasoning are factors that bear upon the amount of deference to be given an agency's ruling." *F.E.C. v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981). In this instance, Respondent submits that the E.E.O.C.'s view expressed in its brief below is "inconsistent with the statutory mandate" of Title VII and was therefore properly rejected by the Eleventh Circuit. *Id.* at 52.

this instance, however, the form *is* the substance, and we are unwilling to dictate partnership decisions under the guise of employee promotions protected by Title VII. The very essence of a partnership is the voluntary joinder of all partners with each other."

678 F.2d at 1028
(App. A-10).

Finally, the Eleventh Circuit's decision recognizes that the question of whether Title VII governs *admission* to partnership cannot reasonably be isolated from the broader question of "whether Title VII applies to a law firm's decisions regarding its partners." 678 F.2d at 1026 (App. A-5). Certainly Petitioner's argument that partners should be considered "employees" of the firm would lead inexorably to the conclusion that Title VII governs all aspects of the partners' relations among themselves. The Eleventh Circuit found the legislative history devoid of any indication that Congress intended such a result. Indeed, even the *Lucido* Court was reluctant to embrace so broad a reading of Title VII. 425 F.Supp. at 128. Respondent submits that, in the absence of a clear expression of Congressional intent to regulate the relationship among partners, Petitioner's argument must fail.

In summary, Petitioner asks this Court to consider a question of statutory construction which was carefully analyzed and decided by the lower courts. That this issue is not a matter of great moment is reflected by the fact that the position espoused by Petitioner has been asserted in only one other case and has produced no conflict in the decisions of the Circuit Courts. Petitioner's effort to imbue the case with an aura of historical significance which it cannot support should not obscure these facts.

CONCLUSION

For the reasons set forth above, Respondent respectfully submits that a writ of certiorari should not be granted in this case.

Respectfully submitted,

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MOTION FILED
JAN 7 1983

No. 82-940

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ELIZABETH ANDERSON HISHON,

Petitioner,

—v.—

KING & SPALDING,

Respondent.

MOTION FOR LEAVE TO FILE AND BRIEF OF CONNECTICUT WOMEN'S EDUCATIONAL AND LEGAL FUND, INC., EQUAL RIGHTS ADVOCATES, INC., AND NOW LEGAL DEFENSE AND EDUCATION FUND AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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No. 82-940

IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1982

ELIZABETH ANDERSON HISHON,

Petitioner,

v.

KING & SPALDING,

Respondent.

Petition for a Writ of Certiorari To The

United States Court Of Appeals

For The Eleventh Circuit

MOTION FOR LEAVE TO

FILE BRIEF AMICUS CURIAE

The NOW Legal Defense and Education Fund, Connecticut Women's Educational and Legal Fund, Inc., and Equal Rights Advocates, Inc. respectfully move this Court for leave to file the accompanying brief Amicus Curiae in support of the Petition for Certiorari submitted by Elizabeth Anderson Hishon. Together with Petitioner, we ask this Court to grant certiorari and review the decision of the Eleventh Circuit holding that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII") is inapplicable to promotions to partnership within private law firms.

Consent to file the attached brief has been sought from the parties; while Petitioner has consented, King & Spalding has not. We therefore request permission

of this Court under Rule 36.

The Interest Of The Amici Curiae

The NOW Legal Defense and Education Fund ("NOW LDEF") is a non-profit civil rights organization that performs a broad range of legal and education services nationally in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was established in 1970 by leaders of the National Organization for Women, a membership organization of over 190,000 men and women in more than 700 chapters throughout the United States. A major goal of the NOW LDEF is eliminating barriers that deny women economic opportunities. In furtherance of that goal, NOW LDEF has participated in numerous cases to secure full

enforcement of laws prohibiting employment discrimination, most recently as amicus curiae in this Court in U.S. Postal Service v. Aikens, No. 81-1044.

Connecticut Women's Educational and Legal Fund, Inc. ("CWEALF") is a non-profit public interest law firm specializing in cases of sex discrimination. Since its inception in 1974, CWEALF has represented plaintiffs in numerous employment discrimination cases and has also been active in educating women about their legal rights in the workplace. CWEALF is strongly interested in maintaining Title VII as a broad remedial statute against employment discrimination.

Equal Rights Advocates, Inc., is a San Francisco based, public interest

legal and education corporation specializing in the area of sex discrimination. It has a long history of interest, activism and advocacy in all areas of the law which affect equality between the sexes. Equal Rights Advocates, Inc. has been particularly concerned with gender equality in the work force because economic equality is fundamental to women's ability to achieve equality in other aspects of society. This concern has been expressed through Equal Rights Advocates, Inc.'s representation of the plaintiffs in Berg v. Richmond Unified School District, 434 U.S. 158 (1977) and Kouba v. Allstate Insurance Co., 691 F.2d 873 (9th Cir. 1982) as well as its participation as amicus curiae before this Court in U.S. Postal Service v. Aikens, No. 81-1044.

Amici share a commitment to ending discrimination against women in all areas of the work force, including the professions. They bring to this case their extensive experience in the litigation of employment discrimination cases covering a wide range of occupations. Amici believe that their brief will highlight for the Court the importance of this case in the continuing effort to secure full economic equality for all women.

Respectfully submitted,

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No. 82-940

IN THE

SUPREME COURT OF THE

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October Term, 1982

ELIZABETH ANDERSON HISHON,

Petitioner,

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KING & SPALDING,

Respondent.

Petition For A Writ Of Certiorari To

The United States Court

Of Appeals For The Eleventh Circuit

BRIEF AMICUS CURIAE OF CONNECTICUT WOMEN'S EDUCATIONAL AND LEGAL FUND, INC., EQUAL RIGHTS ADVOCATES, INC., AND NOW LEGAL DEFENSE AND EDUCATION FUND

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No. 82-940

IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1982

ELIZABETH ANDERSON HISHON,

Petitioner,

v.

KING & SPALDING,

Respondent.

Petition For A Writ Of Certiorari To

The United States Court

Of Appeals For The Eleventh Circuit

BRIEF AMICUS CURIAE OF CONNECTICUT WOMEN'S EDUCATIONAL AND LEGAL FUND, INC., EQUAL RIGHTS ADVOCATES, INC., AND NOW LEGAL DEFENSE AND EDUCATION FUND

Amici respectfully ask that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit in the above-captioned case.

Opinions Below

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 678 F.2d 1022 (1982). The opinion of the United States District Court for the Northern District of Georgia is unofficially reported in 25 Empl. Prac. Dec. (CCH) ¶ 31,703 (N.D. Ga. 1980), and is reproduced in the Appendix submitted by Petitioner Elizabeth Hishon.

Jurisdiction

The jurisdiction of this Court was invoked under 28 U.S.C. § 1254.

Interest of the Amici Curiae

The interest of the Amici is stated in the "Motion for Leave to File Brief Amici Curiae", supra.

Statutory Provisions Involved

Title VII provides in pertinent part:

"Definitions

> (a) The term 'person' includes ... individuals, governments, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, ... or receivers.
>
> (b) The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees ... "
>
> Section 701(a), (b), 42 U.S.C. § 2000e(a), (b) (emphasis supplied).
>
> "Unlawful Employment Practices
>
> (a) It shall be an unlawful employment practice for an employer

> (1) ... to discharge any individual, or otherwise to discriminate against any individual with respect to ... terms, conditions or privileges of employment, because of ... race, color, religion, sex, or national origin; or
>
> (2) to limit ... employees ... in any way which would deprive or tend to deprive any individual of employment opportunities ... because of ... race, color, religion, sex, or national origin."
>
> Section 703(a)(1), (2), 42 U.S.C. § 2000e-2(a)(1), (2).

Statement of the Case

Petitioner, Elizabeth Anderson Hishon, was employed as an associate by the law firm of King & Spalding. She was denied partnership by the firm and, pursuant to the firm's "up or out" policy, was discharged in 1979. She brought suit under Title VII charging discrimination on the basis of sex.

The District Court for the Northern District of Georgia, after refusing to grant discovery on the merits, dismissed Ms. Hishon's complaint under Fed. R. Civ. P. 12(b)(1). Reasoning that "a professional partnership is like a marriage," the court held that, as a matter of law, Title VII did not govern decisions to promote an associate in a law firm to partnership. As the District Court put it:

> "To use or apply Title VII to coerce a mismatched or unwanted partnership too closely resembles a statute for the enforcement of shotgun weddings." 25 Empl. Prac. Dec. (CCH) ¶ 31,703 at 23,062 (N.D. Ga. 1980).

On appeal, the Court of Appeals for the Eleventh Circuit affirmed, over the vigorous dissent of Circuit Judge Tjoflat. Sharing the District Court's concern not to intrude on the rights of "voluntary association" of law firms, the Court of Appeals construed Title VII

narrowly. It held that promotion to partnership was not a "term, condition or privilege of employment" protected by section 703(a)(1) or an "employment opportunity" protected by section 703(a)(2). Moreover, the Court held, King & Spalding's "up or out" policy -- pursuant to which Ms. Hishon's denial of partnership was tantamount to a discharge from the firm -- was not covered by the discharge provisions of Title VII. Although it acknowledged that the only other federal court to have considered these issues had held precisely the opposite, Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123 (S.D.N.Y. 1977), the Court refused to follow Lucido. Conceding that a dismissal under Fed. R. Civ. P. 12(b)(1) is only proper when "it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim, which would entitle [her] to relief," the Court held:

> "Even under the most liberal reading we cannot find the requisite congressional intent to permit Title VII's intervention into matters of voluntary association." 678 F.2d at 1026.

Summary of Argument

The Court should grant certiorari for several reasons. First, the Eleventh Circuit decision conflicts with the Congressional mandate embodied in Title VII and with the only other Court decision on point. Second, the Eleventh Circuit's decision will have a substantial and far-reaching effect because it carves out from the scope of Title VII a substantial, and unwarranted, exemption for partnerships which have a practice of filling at least some partnership positions by promoting associates from within the firm. Since the partnership form is used by many business entities -- not simply law firms --

and these entities also choose partners from among their employees, the logic of the Eleventh Circuit's decision could deny to employees in a great many businesses the protections of Title VII. Finally, the Eleventh Circuit decision is wrong, relying on a mistaken view of the associational rights of partnerships like King & Spalding.

POINT I

THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH THE CONGRESSIONAL MANDATE AND WITH THE ONLY OTHER COURT DECISION ON POINT

A. The Eleventh Circuit's decision conflicts with the Congressional mandate

Congress has prohibited partnerships from discriminating against minorities or women with respect to "terms, conditions, or privileges of employment," and "employment opportunities." 42 U.S.C. § 2000e-

-2(a)(1), (2).* In a partnership like King & Spalding, which follows the practice of filling partnership positions by promoting associates from within the firm, a promotion to partnership is a "term, condition or privilege of employment" and an "employment opportunity" within the meaning of Title VII. In addition, in those partnerships which share with King & Spalding an "up or out" policy, the forced departure is a discriminatory discharge also covered by the statute.

In adopting Title VII, Congress intended a broad remedial statute which would reach employment discrimination in

---

* Under Title VII, "employers" may not discriminate. 42 U.S.C. § 2000e-2(a)(1). An "employer" is a "person engaged in an industry affecting commerce who has fifteen or more employees ...." 42 U.S.C. § 2000e-2(a), (b). The term "person" includes "partnerships." 42 U.S.C. § 2000e(a), (b).

all but its most insignificant manifestations. The statute banned "all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin." County of Washington v. Gunther, 452 U.S. 161, 178 (1981), quoting Franks v. Bowman Transportation Co., 424 U.S. 757, 763 (1976). Included are discriminatory promotion practices. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). This Court, in keeping with the Congressional mandate, has construed Title VII broadly to achieve its remedial purpose.

The courts have uniformly held that Title VII prohibits discrimination in promotions not merely to rank and file but also to middle and upper echelon positions. See, e.g., Payne v. Travenol Labs, 673 F.2d 798 (5th Cir. 1982) (Title VII

applies to promotions to technical, managerial and executive level jobs); Lieberman v. Gant, 630 F.2d 60, 64 (2d Cir. 1980) (Friendly, J.) (Title VII applies to tenure decisions); Kunda v. Muhlenberg College, 621 F.2d 532 (3rd Cir. 1980) (tenure decisions); Gilmore v. Kansas City Terminal Railway Co., 509 F.2d 48, 51 (8th Cir. 1975) (managerial and supervisory positions); Pinckney v. County of Northampton, 512 F. Supp. 989 (E.D. Pa. 1981), aff'd, 681 F.2d 808 (3rd Cir. 1982) (executive positions); Ste. Marie v. Eastern Railway Ass'n, 458 F. Supp. 1147 (S.D.N.Y. 1978), rev'd on other grounds, 650 F.2d 395 (2d Cir. 1981) (top management and executive positions); Hecht v. Cooperative for American Relief Everywhere, Inc., 351 F. Supp. 305 (S.D.N.Y. 1972) (executive positions). See also Bartholet, Application of Title VII to

Jobs in High Places, 95 Harv. L. Rev. 945 (1982).

Congress made no distinction between professional and nonprofessional employment, making discriminatory practices in both illegal. Accordingly, promotions in professional employment situations are covered by Title VII.*

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* Congress' intent to include professional employment within the scope of Title VII is clear from the legislative history available. Senator Javits, in opposing an amendment that would have excluded hospital-employed physicians from Title VII coverage said:

> "One of the things that those discriminated against have resented the most is that they ... cannot ascend the higher rungs in professional and other life.
>
> "Yet this amendment would ... reinstate the possibility of discrimination on grounds of ethnic origin, color, sex, religion -- [among] physicians or surgeons, one of the highest

(footnote continued)

In addition to the language and legislative history of Title VII, no logical distinction exists for excluding from Title VII coverage advancement to partner

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rungs of the ladder that any member of a minority could attain -- and thus lock in and fortify the idea that being a doctor or surgeon is just too good for members of a minority ... that they have to be subject to discrimination ... and the Federal law will not protect them."118 Cong. Rec. 3802 (1972).

The amendment was defeated. See also EEOC v. Rinella & Rinella, 401 F. Supp. 175, 179-81 (N.D. Ill. 1975) ("[t]he courts ... have found little distinction between professional and nonprofessional job situations, concluding that, since the primary objective of Title VII is the elimination of the major social ills of job discrimination, discriminatory practices in professional fields are not immune from attack"); Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123, 126 (S.D.N.Y. 1977) ("Congress clearly included in the objectives of Title VII the elimination of job discrimination in professional fields including law ..."); Kohn v. Royall, Koegel & Wells, 59 F.R.D. 515, 521 (S.D.N.Y. 1973), app. dis., 496 F.2d 1094 (2d Cir. 1974).

at a partnership like King & Spalding while including promotions to upper level jobs in corporations or universities. The possibility of promotion in a corporation or award of tenure in a university acts as an inducement to attract talented individuals to accept the institution's offer of employment and to do well once they are there. Similarly, the possibility of advancement to partner attracts associates like Ms. Hishon to the firm and motivates them to work hard. According to the record in this case, Ms. Hishon and other associates were persuaded to accept employment by King & Spalding by the promise that they would be considered for partnership on a non-discriminatory basis after five or six years of employment. Complaint ¶ 8(b). See also Answer ¶ 8(b) ("... all associates are employed with the expectation that they will be considered

for ... partnership ... within a reasonable period of time ...").* Associates' work at King & Spalding was evaluated annually in terms of their progress toward partnership. Complaint ¶ 8(c). See also Answer ¶ 8(c) (King & Spalding admits this). King & Spalding's practice was to promote associates who received appropriate evaluations to partner. Complaint ¶ 8(d). See also Answer ¶ 8(b) (King & Spalding admits that associates who "meet the firm's standards for partnership" are promoted). In addition, King & Spalding's practice was to require associates who were not promoted to partner to seek employment elsewhere. Answer ¶ 9. These

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* While only the allegations in the complaint need be taken as true for the purpose of this certiorari petition, see Conley v. Gibson, 355 U.S. 41 (1975), the promotion practices we address are admitted by King & Spalding, as we show in the text.

practices make advancement to partner a promotion like any other promotion. Thus, advancement to partner is within the meaning of "terms, conditions and privileges of employment" and "employment opportunities," and is covered by Title VII. See Lucido, 425 F. Supp. at 127-28. See also cases cited supra at 10. The Eleventh Circuit's decision to the contrary is clearly wrong.

B. The Eleventh Circuit's decision conflicts with the only other court decision on point

The only other reported Title VII decision involving promotion to partnership squarely contradicts the Eleventh Circuit's decision. Lucido, supra, 425 F. Supp. 123 (S.D.N.Y. 1977). In Lucido, the Court held that promotion to partnership is a "term, condition or privilege of employment" and an "employment opportunity" within the meaning of Title VII. The

Eleventh Circuit in Hishon conceded that Lucido was conflicting authority but expressly rejected its holding. 678 F.2d at 1029.

Lucido was more persuasively reasoned. In Lucido, the law firm argued that since Title VII did not apply to the relationship among the partners themselves, it could not apply to the process by which an associate attorney becomes a partner. The court responded that, even assuming that Title VII does not apply to the partners themselves, it does apply to the employer/employee relationship between the firm and the associate. Any discrimination that occurs with regard to a promotion opportunity -- while that employer/employee relationship continues -- is covered by Title VII. 425 F. Supp. at 128. Cf. NLRB v. Bell Aircraft Corp., 206 F.2d 235 (2d Cir. 1953) ("immaterial

that the protection ... afforded was calculated to enable him to obtain a position in which he would no longer be protected"). See also Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973).

The issues that divide the Hishon and Lucido courts promise to recur, since lawsuits alleging discrimination by law firms are common. See, e.g., Kohn v. Royall, Koegel & Wells, 496 F.2d 1094 (2d Cir. 1974); Blank v. Sullivan & Cromwell, 418 F. Supp. 1 (S.D.N.Y. 1975); EEOC v. Rinella & Rinella, 401 F. Supp. 175 (D.C. Ill. 1975). Moreover, the logic of the Eleventh Circuit's opinion has far-reaching implications for other professions.

Point II

THIS CASE PRESENTS LEGAL ISSUES OF FAR-REACHING IMPORTANCE

The Eleventh Circuit's decision -- that Title VII does not cover promotions to partnership within law firms like King & Spalding -- presents legal issues of far-reaching consequences. Discrimination within such law firms against women and minorities, an entrenched pattern historically, remains a serious problem today.*

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* Cf. Epstein, Women in Law 15 (1981) ("Prejudice against [women and blacks] was of a different quality than that against men of ethnic and religious minority backgrounds because common cultural attitudes held that they had basic incapacities for professional work, and their race and sex statuses -- their physical attributes -- could not be concealed"); C.P. Clark, Minority Opportunities in Law for Blacks, Puerto Ricans & Chicanos 6 (1974) ("The world of the large, private firm has opened up somewhat; however, few are getting equal opportunity"); P. Hoffman, Lions in the Street 138-39 (1973) ("In 1971, nine women law students and recent graduates of Columbia and N.Y.U. filed

(footnote continued)

Exempting such law partnerships from the scope of Title VII promises to exacerbate that problem. While the problem is undoubtedly less severe than it once was, the vestiges of sex and racial discrimination persist -- particularly in the

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a sex-discrimination complaint with the city's Commission on Human Rights against ten law firms, including such pillars of the Legal Establishment as Cravath, Shearman & Sterling, Sullivan & Cromwell and Winthrop Stimson. ... After a year-long investigation, the Human Rights Commission issued its findings of the first firm studied -- Royall Koegel. It found a 'pattern and practice' of discriminatory recruitment, hiring, promotion and treatment of women attorneys"); E. Smigel, The Wall Street Lawyer 46 (1969) ("While most large law offices now do have some women in their organization, very few become partners"); Paone and Reis, Effective Enforcement of Federal Nondiscrimination Provisions in the Hiring of Lawyers, 40 So.Cal. L.Rev. 615, 616-19 (1967) ("The few available studies on law firm discrimination indicate that the large firms, considered highly desirable by superior law students, exercise the most blatant discrimination in the legal profession").

realm of partnership decisions. In one recent survey, it was noted that among the 150 or so largest law firms, 32 had no women partners, and 29 more had only one or two. Flaherty, Women & Minorities: The Gains, The National Law Journal, Vol. 5, No. 15, December 20, 1982, p. 8. Moreover, 106 of the firms had no black partners, and fully 133 of them had no Hispanic partners. Plainly, partnership decisions remain a focal point for the struggle against discrimination.

Moreover, an exception to Title VII for promotions to partnership like King & Spalding would not simply affect law firms. Partnership is a common form of business organization, in particular of accounting firms, advertising agencies and brokerage houses. It is also used in industry, forestry, agriculture, fishing, mining, construction, manufacturing, tran-

sportation, public utilities, wholesale and retail trade, finance, insurance and real estate. The total number of partnerships in the United States is approximately 1,153,000. U.S. Bureau of the Census, Statistical Abstract of the United States: 1981 at 535, chart 899 (102d ed. 1981).

In accounting firms, partnerships are often large, multi-million-dollar businesses which employ thousands of people. As of 1981, the "big eight" accounting firms together had approximately 7,000 partners and accumulated total revenues of over $6 billion. See The Year of the Accountant, New York Times, Business Section (January 3, 1982). As this Court aptly observed in Bellis v. United States, 417 U.S. 85, 93 (1970), "[s]ome of the most powerful private institutions in the Nation are conducted in the partnership form."

An exception to Title VII for promotions to partnership thus promises to exempt more than just law firms from coverage under the Act; it would also leave unprotected a substantial part of the non-legal workforce. Moreover, because it is a simple matter for companies to adopt a partnership form, businesses -- given an opportunity to elude the obligations of Title VII -- will have an incentive to organize, or reorganize, as partnerships. Plainly, the Eleventh Circuit's decision opens the door to a pervasive circumvention of the law.

Point III

THE DECISION OF THE ELEVENTH CIRCUIT RELIES ON A MISTAKEN VIEW OF THE ASSOCIATIONAL RIGHTS OF PARTNERSHIPS

In holding that Title VII does not govern promotions to partnership within law firms, the Eleventh Circuit professed

an inability to "find the requisite Congressional intent to permit Title VII's intervention into matters of voluntary association." 678 F.2d at 1026. Concerned with the "associational" interests of law firms, the Circuit Court construed the language of Title VII narrowly, declining, for example, "to extend the meaning of 'employment opportunities' beyond its intended context by encroaching upon individuals' decisions to voluntarily associate in a business partnership." Id. at 1028. The Circuit Court's concern with associational interests was misplaced.

A. Congress intended no such "associational" exception to Title VII

The Eleventh Circuit carved out an exception to Title VII for law firm partnerships -- in deference to the firms' supposed right of voluntary association. This "associational" exemption from the

scope of Title VII was not contemplated by Congress. Indeed, when Congress intended to create "associational" exceptions to Title VII, it did so directly and unambiguously.

Thus, when Congress wished to protect the interests of private clubs and religious organizations, it provided specific exceptions to Title VII. See 42 U.S.C. § 2000e(b)(2) (excluding private clubs from coverage); 42 U.S.C. § 2000e-1 (allowing religious organizations to discriminate in favor of co-religionists). Similarly, by exempting enterprises having fewer than fifteen employees from Title VII coverage, Congress again recognized -- through express statutory provisions -- the as-

sociational interests of small organizations. See 42 U.S.C. § 2000e(b).*

Congress included no similar exception for law firm partnerships. Had it intended such an exemption, Congress certainly knew how to create one.

B. In any case, the Eleventh Circuit misapplied settled principles of "associational" law.

Besides ignoring the intent of Congress, the Eleventh Circuit overlooked

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* As Senator Humphrey noted during the debates on Title VII, when businesses exceed the statutory limit of employees, as a practical matter "they ... lose most of whatever intimate, personal character they might have had." 110 Cong. Rec. 13088 (1964). See also 42 U.S.C. § 2000a-(b)(1) (exempting owner-occupied establishments with five or fewer rooms for rent from the public accommodations provisions of Title II of the Civil Rights Act of 1964); and 42 U.S.C. § 3603(b)(2) (exempting "Mrs. Murphy's boarding house" from the provisions of the Fair Housing Act of 1968).

settled legal principles governing free association. In the view of the Circuit Court, the freedom to associate outweighs the anti-discrimination policies of Title VII. Yet, this Court has expressly held in other contexts that acts of discrimination may not be justified in the name of free association. As the Court held in Norwood v. Harrison, 413 U.S. 455, 470 (1977):

> "Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections."

Similarly, in Runyon v. McCrary, 427 U.S. 160, 176 (1976), this Court stated:

> "it may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desir-

> able.... But it does not follow that the practice of excluding racial minorities from such institutions is also protected by the same principle."*

The Eleventh Circuit's reliance on associational rights was thus excessive -- starkly so. The freedom to associate is not absolute. CSC v. Nat'l Assoc. of

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* Cf. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258-59 (1964) (upholding constitutionality of the public accommodations provisions of Title II of the Civil Rights Act of 1964):

> "The only questions are: (1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate. If they are, appellant has no 'right' to select its guests as it sees fit, free from governmental regulation."

See also Railway Mail Ass'n v. Corsi, 326 U.S. 88, 93-94 (1945) (due process does not prohibit state from banning racial discrimination in union membership).

Letter Carriers, 413 U.S. 548, 567 (1973). Governmental policies intended to further a compelling state interest -- such as Title VII -- may justify restrictions on associational interests. A balance must be struck between conflicting policies. For example, the interest in effective government justified restrictions on the associational rights of federal employees. CSC v. Nat'l Assoc. of Letter Carriers, supra. Similarly, the interest in avoiding the actuality and appearance of political corruption was held to justify limitations on the associational rights of campaign contributors. Buckley v. Valeo, 424 U.S. 1, 24-28 (1976). In contrast, the Circuit Court resolved the conflict between Title VII and rights of association by simply eliminating the statute from its calculus, simply ignoring this Court's frequent

recognition of the need to balance competing interests.

The Eleventh Circuit's excessive solicitude for associational rights is particularly misplaced where, as here, it is a commercial enterprise -- a law firm -- whose associational interests are at stake. There is much in the opinions of this Court to suggest that entities do not enjoy the same measure of First Amendment protection in their commercial activities as they do in their political speech and associations. Two recent cases -- both involving associational claims -- put the issue squarely. In In re Primus, 436 U.S. 412 (1978), the Court set aside a disciplinary reprimand issued to a South Carolina attorney accused of improperly soliciting a client. On behalf of the ACLU, the attorney had arranged to represent a woman who had been sterilized as a

condition of her continued receipt of Medicaid payments. Relying on NAACP v. Button, 371 U.S. 415 (1963), this Court held that the attorney's representation was political expression, protected by her right of association under the First Amendment. In so ruling, the Court expressly distinguished "traditional fee-paying arrangements" and noted that the representation in Primus could not be viewed as "motivated by considerations of pecuniary gain rather than by ... [the] goal of vindicating civil liberties." 436 U.S. at 429-30.

On the same day, this Court decided Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978). Again, an attorney had been disciplined for improperly soliciting clients. In Ohralik, however, unlike in In re Primus, the solicitation had no elements of political expression; it was

commercial enterprise -- pure and simple. Noting that commercial expression does not enjoy the same protection as political expression, the Court upheld as proper the attorney's suspension. 436 U.S. at 455-56. As the Court explained:

> "A lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns. It falls within the State's proper sphere of economic and professional regulation." Id. at 459.

This lesser degree of protection for associational interests growing out of commercial activity was also a basis for the Court's decision in Lucido.*

Title VII prohibits, inter alia, sex discrimination in employment. It does not

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* Cf. Kunda v. Muhlenberg College, 621 F.2d 532, 547-51 (3d Cir. 1980); Lieberman v. Gant, 630 F.2d 60, 64 (2d Cir. 1980) (Friendly, J.).

inhibit a partnership's traditional exercise of discretion in the non-discriminatory selection of new members. The Lucido court recognized this principle and correctly applied it. The Eleventh Circuit, however, incorrectly viewed Title VII as wholly subordinated to partnerships' associational claims.

Conclusion

The Eleventh Circuit has carved out a substantial exception from the reach of Title VII -- one of the centerpieces of civil rights legislation. That exception, for promotions to partnerships, is neither founded in Congressional intent nor justified by applicable case law. It represents, in fact, an unprecedented, unwar-

ranted dilution of the hard-won rights of women and minorities.

Amici respectfully ask that this Court grant certiorari.

Dated: January 5, 1983
New York, New York

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1982

ELIZABETH ANDERSON HISHON,

Petitioner,

vs.

KING & SPALDING,

Respondent

On Certiorari To The United States Court Of Appeals
For The Eleventh Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF ON BEHALF OF THE WOMEN'S BAR ASSOCIATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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ELIZABETH ANDERSON HISHON,

Petitioner,

vs.

KING & SPALDING,

Respondent.

On Certiorari To The United States Court Of Appeals
For The Eleventh Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The Women's Bar Association of Illinois, with consent of the Petitioner Elizabeth Hishon, moves this Honorable Court for leave to file its brief in support of the petition for certiorari. The Women's Bar Association of Illinois believes the questions presented in Ms. Hishon's petition to be of great importance as stated in its proposed brief which has been filed simultaneously with this motion.

Wherefore, the Women's Bar Association of Illinois requests leave of this Honorable Court to file its Amicus brief in support of the petition for certiorari.

Respectfully submitted,

.....

Susan M. Vance

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In the
Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-940

ELIZABETH ANDERSON HISHON,

Petitioner,

vs.

KING & SPALDING,

Respondent.

On Certiorari To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF OF THE WOMEN'S BAR ASSOCIATION OF ILLINOIS, AS AMICUS CURIAE, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

This brief is submitted by the Women's Bar Association of Illinois in support of the petition for certiorari. The Women's Bar Assocation of Illinois (hereinafter "WBAI") maintains the denial of the rights guaranteed by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, to women and other minority professionals who are employed by partnerships is an unlawful exclusion not contemplated by Congress or supported by the language or history of Title VII.

INTEREST OF AMICUS

The WBAI was founded in 1914 for the purpose of promoting and fostering the interests and welfare of women attorneys and maintaining the honor and dignity of the legal profession. The WBAI has over 700 members who practice in all areas of the law, and whose ages range from newly admitted attorneys in their twenties to attorneys in their eighties who have been in practice over fifty years. Since its inception, the WBAI has actively monitored and often become involved in matters affecting the legal profession, women and woman attorneys. Throughout its history, WBAI members have been mindful that in 1872, Illinois resident Myra Bradwell was denied a license to practice law by the Illinois and United States Supreme Courts, for the sole reason that she was a woman. *Bradwell* v. *The State*, 16 Wall. 130 (1872).

The first major activity of the WBAI was its campaign to secure for women the right to vote. Through WBAI's efforts, Illinois was one of the first states to ratify the Nineteenth Amendment, only five days after Congress proposed it to the states. During the 1920's the WBAI repeatedly urged the Illinois legislature to pass a bill allowing women to serve on juries. When it became evident that the legislature would not enact such a proposal, the WBAI and other groups successfully had the measure adopted by a referendum vote of all Illinois citizens. Recently, the WBAI has been active in securing fair divorce legislation, ensuring that battered women have legal representation and has participated in a coalition of working women's groups to maintain the enforcement by federal agencies of Executive Order 11246, which prohibits discrimination by federal contractors.

STATEMENT OF FACTS

The respondent King and Spalding is a law firm which operates as a partnership, employing over one hundred lawyers. It was not until after Ms. Hishon's case was in court, that the century old firm had its first and only woman partner. Elizabeth Hishon was hired by King and Spalding as an associate in 1972. Pursuant to the firm's policy, she was considered for partnership in 1978. She was denied promotion to partner and that decision was reaffirmed upon reconsideration in May of 1979. The firm has an "up or out" policy. Therefore, upon being denied partnership, Ms. Hishon sought other employment.

Shortly after leaving the employ of the respondent, Ms. Hishon filed her Title VII complaint. The district court dismissed the complaint for lack of subject matter jurisdiction. The Court found Title VII to be inapplicable to partnership decisions, holding that "the coverage of the Act seems doubtful and obscure" and the defendant's constitutional right to freedom of association would suffer if Title VII applied. A divided panel of the Eleventh Circuit rejected the constitutional freedom of association holding, but affirmed the decision based upon its perception that a new partner is not an employee of a law firm partnership.

This statement of facts is somewhat truncated, due to an order of the Eleventh Circuit Court of Appeals sealing the record and briefs of the parties from inspection by anyone.

ARGUMENT

This Court has long held that rules of statutory construction are "subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out its particular cases the generally expressed legislative policy." *SEC* v. *Joiner Leasing Corporation*, 320 U.S. 344 (1943).

When confronted with cases questioning the coverage of Title VII, this Court has specifically admonished courts to "avoid interpretations . . . that deprive victims of discrimination of a remedy, without clear Congressional mandate." *County of Washington* v. *Gunther*, 452 U.S. 161, 178 (1981). The panel majority in *Hishon* v. *King and Spalding*, 678 F.2d 1022, (hereinafter "Hishon") ignored this instruction and created a major exception to Title VII not found in the language of the Act or supported by legislative history or prior judicial interpretation. The *Hishon* case, as applied, denies Title VII protection to women and minorities by permitting a business organized as a partnership to refuse to promote minority employees to partner for reasons prohibited by Title VII in making employment decisions.

In interpreting and applying the provisions of Title VII and similar statutes, this Court has engaged in three forms of analysis: it has looked at the plain meaning of the statutory language, *American Tobacco Co.* v. *Patterson*, ... U.S. ....., 102 S.Ct. 1534 (1982); searched the legislative history for Congressional debate defining the limits or pervasiveness of coverage, *North Haven Board of Education* v. *Bell*, ... U.S. ....., 102 S.Ct. 1912 (1982); or, when the language permits differing interpretations or

when Congressional intent is unclear, this Court has examined the interpretation placed on the statute by the agency charged with its execution, *National Labor Relations Board* v. *Hendricks County Rural Electric Membership Corp.*, 450 U.S. 964 (1981). Whichever form of analysis the Court adopts, the result favors Petitioner's assertion that Title VII does not exempt law firms and other employee owned businesses in their promotion decisions.

A. The Language of Title VII Protects all Individuals With Respect to Employment

To determine the coverage of Title VII by examining the language of the Act, the analysis set out by this Court in *American Tobacco Co.* v. *Patterson*, *supra*, provided that:

> . . . in all cases involving statutory construction, our starting point must be the language employed by Congress, and we assume "that the legislative purpose is expressed by the ordinary meaning of the words used." Thus "[a]bsent a clear expressed legislative intent to the contrary, the language must be ordinarily regarded as conclusive." [citations omitted.]

In this instance then, the initial inquiry must focus on the following statutory language:

> 42 U.S.C. §2000e(a) The term "person includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, *partnerships*, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers. (As amended) (emphasis added)
>
> §2000e(b) The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any *agent* of such a person, but such term does not include (1) the United

States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5 of the United States Code), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954, except that during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972, persons having fewer than twenty-five employees (*and their agents*) shall not be considered employers. (As amended) (emphasis added).

§2000e-2(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any *individual*, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (emphasis added)

* * *

There can be no argument, and indeed the majority panel in *Hishon* readily admitted, that §2000e(a) and (b) clearly provide that partnerships are employers covered by the prohibitions of Title VII. What the Circuit Court did not consider is that §2000(e)-2(a) is not limited to employees, but extends its protections to "any individual." If Congress had so intended, it could have easily limited the scope of the Act's coverage to employees only. However, in §2000(e)-2(a) it instead chose to cover employees, applicants for employment and individuals aspiring to promotion as partner. Had Congress wished the Act to only cover employees and applicants for employment, it could easily have done so, using just those simple plain words. It did not. The use of the word individual clearly signal-

an intention to cover a wider group of people in employment relationships, not merely employees.

A review of the variety and scope of the exclusions and exemptions Congress did make in Title VII's coverage gives further evidence that Ms. Hishon is an intended beneficiary of the Act. Excluded from coverage, and therefore not employers, are the following categories found at §2000e(a), persons having less than fifteen employees and agents, Indian tribes and bona fide private clubs. §2000e-1 excludes religious institutions with respect to the religious work of the institution and also eliminates employers in connection with the hiring of aliens outside the United States. Excluded from Title VII's definition of an unlawful employment practice is the refusal to hire or the discharge of members of the Communist Party, §2000e-2(f) and similar actions with regard to individuals who cannot obtain security clearances, if the national interest requires one, §2000e-2(g). With these many and varied exceptions, it is clear that had Congress wished to exclude the hundreds of thousands of individuals who are employed by businesses and professions historically organized as partnerships, it could easily have done so.

Since the enactment of Title VII, various employee owned businesses have asserted that their activities are excluded from coverage. Law firms originally contended that associate hiring should be a judicially created exception. That argument was rejected in *Kohn* v. *Royall, Koegel & Wells*, 59 F.R.D. (S.D.N.Y. 1973), *appeal dismissed*, 496 F.2d 1094 (2nd Cir. 1974). The same assertion that is made in this case, that of an implied exemption for partnership decisions was denied in *Lucido* v. *Cravath, Swaine & Moore*, 425 F.Supp. 123 (S.D.N.Y. 1977). The Hishon Court termed "enlightening" the Seventh Circuit's discussion of whether Title VII applies to partnerships in *Burke* v. *Friedman*, 556 F.2d 867 (7th Cir. 1977). In

Burke, the Seventh Circuit refused to count the partners in the partnership to arrive at the jurisdictionally required fifteen "employees." The Act, however, in §2000e(b), expressly states that agents are to be included in counting employees. This Court has long held that partners are agents when engaged in the business of the partnership. *Strang* v. *Bradner*, 114 US 555 (1855), *Latta* v. *Kilbourn*, 150 U.S. 524 (1893). Recently, an employee owned business asserted that shareholder preference in the determination of compensation and work assignment should be excluded because Title VII does not reach the sale of stock. *Bonilla* v. *Oakland Scavenger Company*, 51 L.W. 2301, (9th Cir. November 9, 1982). In *Bonilla*, the Court rejected that argument, finding that the shareholder preference plan, which favored those of Italian descent, was a condition of employment as defined by §2000e-2(a).

The language of the statute contains no exclusions for partnerships or other employee owned businesses, and the Courts have, until the *Hishon* decision, rejected the argument that the Courts should carve out such an exception to the Act.

B. The Legislative History Indicates That Congress Did Not Intend to Exclude the Professions.

The legislative history of Title VII which contains the most insight to its sex discrimination provisions is the debate and record surrounding the 1972 amendments. These offer a clear understanding of Congressional intent. The House Report statement of purpose which prefaces the 1972 amendments, found in *U.S. Code and Administrative News, 92nd Congress, 1972*, Legislative History, at p. 2140, reflects a concern that women were still being relegated to lesser positions despite the enactment of Title VII in 1964.

Among other statements, the following concern was expressed:

> Women are subject to economic deprivation as a class. Their self-fulfillment and development is frustrated because of their sex. Numerous studies have shown that women are placed in the less challenging, the less responsible and the less remunerative positions on the basis of their sex alone.

In 1972, the original exemption for school teachers and university professors was eliminated and coverage was extended to these professions. Proposed in the Senate, at the same time, was an amendment which would have exempted physicians and surgeons employed by public and private hospitals. Senator Jacob Javits, the senior Senator from New York, spoke out against the exclusion of any professionals and against that amendment in particular by stating:

> One of the things that those discriminated against have resented the most is that they are relegated to the position of the sawers of wood and the drawers of water, that only the blue collar jobs and ditch-digging jobs are reserved for them; and that though they built America, and certainly helped build it enormously in the days of its basic construction, they cannot ascend the higher rungs in professional and other life.
>
> * * *
>
> Yet this amendment would go back beyond decades of struggle and of injustice and reinstate the possibility of discrimination on grounds of ethnic origin, color, sex, religion—just confined to physicians or surgeons, one of the highest rungs of the ladder that any member of a minority could attain—and thus lock in and fortify the idea that being a doctor or surgeon is just too good for members of a minority, and that they have to be subject to discrimination in respect to it, and the Federal law will not protect them. 118 Cong. Rec. 3802 (1972).

Thousands of women who aspired to professional careers were initially thwarted by the failure of professional schools to admit them. The dramatic increase in the number of women who have graduated from law school in the last two decades demonstrates that the removal of sex based barriers must precede full development of opportunity.

The American Bar Association Review of Legal Education, Fall 1981, lists the following statistics for women graduating from ABA accredited law schools.

1981	11,587
1979	9,735
1977	7,651
1975	4,546
1973	2,280

According to the most recent Department of Labor, Bureau of Labor Statistics figures, in 1981 there were 119,000 women physicians and dentists, 82,000 female judges and lawyers, and more than 300,000 women accountants. The Department of Labor Statistics also showed that the median annual earnings of a woman working full time in 1981 represented 59.8 percent of the earnings of a male in the same employment category. United States Department of Labor, Bureau of Labor Statistics, Employment and Earnings, November, 1982. In addition to lawyers, accountants and physicians, mortgage bankers and architects also work in professions historically organized as partnerships.

C. The Equal Employment Opportunity Commission Has Not Interpreted the Statute to Exclude Partnerships.

The third method of statutory construction this Court has used has been to examine the interpretation placed on the statute being litigated by the agency charged with its execution. *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 450 U.S. 964 (1981). The agency charged with the administration of Title VII, the Equal Employment Opportunity Commission, has made its statutory interpretation of §2000e(a)(1) and (2) as applied to the facts most clear by its opposition, to the majority decision in this case. EEOC filed an amicus brief in support of *en banc* reconsideration of this case before the Eleventh Circuit.

In that brief, the EEOC adopted the *Lucido* v. *Cravath*, *supra*, standard as the correct analysis of Section 2000e-2 (a). The EEOC asserted, at page 8 of its brief, "As an associate, Ms. Hishon was indisputably the firm's employee, protected under Title VII from discrimination in the 'terms, conditions, or privileges of employment' (§703 (a)(1), 42 U.S.C. §2000e-2(a)(1), and the discriminatory deprivation of employment opportunities. 703(a) (2), 42 U.S.C. §2000e(a)(2)." Implicitly the EEOC recognized promotion to partner was the most crucial privilege of employment as an associate at King and Spalding. The EEOC alternatively supported dissenting Judge Tjoplat's analysis under King and Spalding's "up and out" policy. Under that analysis, Ms. Hishon's termination as an associate was an employment decision covered by the provisions of Title VII.

CONCLUSION

The Women's Bar Association of Illinois urges this Court to grant the petition for certiorari. If the Eleventh Circuit opinion is allowed to stand, it will signal to all employee owned businesses that, at this crucial juncture in the careers of the vast majority of women and minority professionals, these employers are free to deny genuine participation in professional enterprises to individuals on the basis of sex, race, religion and national origin rather than individual merit and achievement.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term 1982

ELIZABETH ANDERSON HISHON,

Petitioner,

vs.

KING & SPALDING,

Respondent.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF PETITIONER

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QUESTION PRESENTED

Whether King & Spalding and other large institutional law firms that are organized as partnerships are, for that reason alone, exempt from Title VII of the Civil Rights Act of 1964, and are free (a) to discriminate in the promotion of associate lawyers to partnership on the basis of sex, race or religion; and (b) to discharge those associates whom they do not admit to partnership based on reasons of sex, race or religion under an established "up-or-out" policy.

INTERESTED PARTIES

The following listed parties have an interest in the outcome of this case:

Elizabeth Anderson Hishon (Petitioner)

King & Spalding (Respondent)

William K. Meadows
Charles L. Gowen
Hughes Spalding, Jr.
James M. Sibley
Griffin B. Bell
Charles H. Kirbo
John Izard
Pope B. McIntire
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Frank C. Jones
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Michael E. Ross
Ruth West Garrett
William B. Fryer
Michael R. Horton
Scott J. Arnold
Bruce N. Hawthorne
Albert H. Conrad, Jr.
Henry L. Bowden, Jr.

Partners in King & Spalding*

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* As listed in Martindale-Hubbell Law Directory 1982.

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2. The Opportunity Theory

By holding out to petitioner and to other associates the promise of equal consideration for partnership, King & Spalding made the opportunity of promotion

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U. S. Dept. of Commerce, Bureau of Census, *County Business Patterns—United States*, United States—Establishments, Employees and Payroll by Industry by Employment—Size Class: 1977 17

OPINIONS AND JUDGMENTS BELOW

The opinion of the Court of Appeals is officially reported as *Hishon v. King & Spalding*, 678 F. 2d 1022 (11th Cir. 1982), and is reproduced as Appendix A to the Petition for a Writ of Certiorari.[1] App. A-1 through A-16. The November 25, 1980 opinion of the district court is unofficially reported as *Hishon v. King & Spalding*, 25 Empl. Prac. Dec. (CCH) ¶ 31,703 (N. D. Ga. 1980) (Appendix B to the Petition, App. A-17 through A-26), and the final judgment dismissing the complaint in conformity with that opinion was entered on November 26, 1980. R. 272; J.A. 259.[2]

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on June 17, 1982. Appendix C to the Petition, App. A-27 through A-28. A timely petition for rehearing *en banc* was denied on September 9, 1982. Appendix D to the Petition, App. A-29 through A-30. The petition for certiorari was filed within 90 days of that date and was granted on January 24, 1983. 51 U. S. L. W. 3552 (Jan. 24, 1983).

Jurisdiction is conferred on this Court by 28 U. S. C. § 1254(1).

STATUTES INVOLVED

Section 701 of Title VII of the Civil Rights Act of 1964 provides in pertinent part:

> **Definitions**
>
> **(a)** The term "person" includes one or more individuals, governments, governmental agencies, politi-

[1] The Petition for a Writ of Certiorari shall be referred to hereinafter as "the Petition." The Appendix to the Petition will be cited as "App."

[2] Joint Appendix.

cal subdivisions, labor unions, *partnerships*, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, . . .

• • •

(f) The term "employee" means an individual employed by an employer . . .

42 U. S. C. § 2000e(a), (b), (f) (emphasis supplied).

"Unlawful employment practices" are defined in § 703 of Title VII as follows:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U. S. C. § 2000e-2(a)(1), (2).

STATEMENT OF THE CASE

Petitioner, Elizabeth Anderson Hishon, is a female lawyer who was employed by King & Spalding as an associate from 1972 until her discharge in December 1979.

Her Title VII complaint[3] (R. 4-19; J.A. 6-26) alleging that King & Spalding discriminated against her on the basis of sex by denying her promotion to partnership and by terminating her employment as an associate under an "up-or-out" policy was dismissed by the district court for want of subject-matter jurisdiction under Rule 12(b)(1) on the ground that Title VII does not apply to sex discrimination relating to partnership decisions. App. A-17 through A-26.

The Allegations of the Complaint

King & Spalding is a partnership engaged in the practice of law in interstate commerce with offices in Atlanta, Georgia, and Washington, D. C. Complaint ¶ 2(a); R. 4; J.A. 6. King & Spalding has more than fifty partners, and employs more than fifty other lawyers as associates and more than fifty non-lawyers in secretarial, paralegal and clerical positions. Complaint ¶ 2(b); R. 4; J.A. 6.

King & Spalding was formed in 1885. R. 161; J.A. 153. At the time the complaint was filed, King & Spalding had never admitted a woman to partnership throughout its almost 100-year history. Complaint ¶ 2(c); R. 4-5; J.A. 6-7. From 1944 until 1977, however, King & Spalding employed a woman (Ms. Antha Mulkey) as the firm's only "permanent associate."[4]

Ms. Hishon was only the second female lawyer employed by King & Spalding. She was employed in 1972 following graduation with honors from the Columbia University School of Law. Complaint ¶ 5; R. 5; J.A. 7. The complaint alleged that petitioner was induced to accept

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[3]The district court's jurisdiction was based on 42 U. S. C. § 2000e-5(f)(3) and 28 U. S. C. § 1331.

[4]See listings of King & Spalding (formerly named Spalding, Sibley & Troutman (Jan. 1943-June 1946), Spalding, Sibley, Troutman & Kelley (July 1946-1955), and Spalding, Sibley, Troutman, Meadow & Smith (1956-1961)) in Martindale-Hubbell Law Directory for the years 1944-1977.

employment with King & Spalding by the express promise and representation that she would be considered for partnership on a fair, non-discriminatory basis upon satisfactory completion of five or six years' employment as an associate. Complaint ¶ 8(c), (d); R. 6; J.A. 9. The complaint also alleged that King & Spalding made similar representations to other promising law school graduates (complaint ¶ 8; R. 6; J.A. 8) and that such promises and representations were "terms, conditions and privileges" of petitioner's employment by King & Spalding within the meaning of § 703(a)(1) of Title VII. Complaint ¶¶ 4, 16(a); R. 5, 8-9; J.A. 7, 11.

The complaint alleged that, despite King & Spalding's promises and representations of fair and non-discriminatory treatment, King & Spalding discriminated against petitioner on the basis of sex and, in considering her for promotion to partnership, refused to utilize the same standards it applied to male associates who were admitted to partnership. Complaint ¶ 17(h); R. 11; J.A. 13.

The complaint also alleged that petitioner's employment as an associate was terminated as a result of the sex discrimination practiced by King & Spalding. Complaint ¶¶ 13, 17(c); R. 8-10; J.A. 10-12. The same discriminatory decision to refuse to admit petitioner to partnership led automatically to her dismissal as an associate under the firm's "up-or-out" policy. *Id.*

The Proceedings Below[5]

The district court imposed a stay on merits discovery and granted petitioner a limited period within which to

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[5]The Equal Employment Opportunity Commission moved to participate in the action as *amicus curiae*, and for access to the record (J.A. 109-10) which the district court had placed under seal. R. 90-92; J.A. 87-89. The district court granted the

(Continued on next page)

conduct discovery restricted to the "coverage" issue. 678 F. 2d at 1025 (R. 88-89; J.A. 86-87).

In partial response to the petitioner's discovery requests, King & Spalding produced a written partnership agreement. R. 161-72; J.A. 153-64. The King & Spalding partnership agreement supersedes the Georgia law of partnerships and performs the same function as a corporate charter by conferring on King & Spalding the principal attributes of incorporation, including (1) perpetual existence (¶¶ 2, 5(a); R. 161-62; J.A. 153-54), (2) a trade name "King & Spalding" which is not the name of any of its living partners (¶ 1; R. 161; J.A. 153), (3) centralized management and control by a committee that is the equivalent of a corporate board of directors (¶ 14; R. 170-71; J.A. 162-63), and (4) a limitation on each partner's ownership interest in the assets of the firm to the amount of his "capital account." ¶ 9(a); R. 166-67; J.A. 158-59.

(Continued from previous page)

EEOC's motion to participate, but denied it access to the record. J.A. 218-19. On appeal, the EEOC again moved for access to the record and to participate as *amicus curiae*. J.A. 5. Although the court of appeals granted the Commission's request to participate in oral argument, it failed to rule on its motion for access to the record. J.A. 5.

The Commission's position in this case was succintly stated in its brief in support of the petitioner's request for rehearing *en banc* in the court of appeals:

> The EEOC, as the agency charged by Congress to enforce and interpret Title VII, submits that the panel's conclusion is erroneous, in that it conflicts with the language and intent of the statute and with relevant Supreme Court case law and rules of statutory construction. Moreover, the decision of the panel majority does not simply deprive the plaintiff in this case of recourse under Title VII. Rather, as the only appellate decision on this issue, it signals to all major legal or other professional partnerships that they may deny equal advancement opportunity to women and minority associates without fear of retribution under the statute.
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> Brief of EEOC, at 2.

King & Spalding objected to the majority of petitioner's discovery and, when the petitioner moved to compel under Rule 37 of the Federal Rules of Civil Procedure, the district court denied the motion and simultaneously dismissed the complaint under Rule 12(b)(1) for want of subject-matter jurisdiction. The district court ruled that, accepting petitioner's allegations of sex discrimination by King & Spalding as true, such discrimination was outside the coverage of Title VII because King & Spalding is organized as a partnership. The district court analogized a law partnership to a marriage and the application of Title VII to a shotgun wedding:

> In a very real sense a professional partnership is like a marriage. It is, in fact, nothing less than a "business marriage" for better or worse. Just as in marriage different brides bring different qualities into the union—some beauty, some money, and some character—so also in professional partnerships, new mates or partners are sought and betrothed for different reasons and to serve different needs of the partnership. Some new partners bring legal skills, others bring clients. Still others bring personality and negotiating skills. In both, new mates are expected to bring not only ability and industry, but also moral character, fidelity, trustworthiness, loyalty, personality and love. Unfortunately, however, in partnerships, as in matrimony, these needed, worthy and desirable qualities are not necessarily divided evenly among the applicants according to race, age, sex or religion, and in some they just are not present at all. To use or apply Title VII to coerce a mismatched or unwanted partnership too closely resembles a statute for the enforcement of shotgun weddings.
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> 25 Empl. Prac. Dec. (CCH) ¶ 31,703, at 20,062 (R. 266; App. A-20).

The trial court refused to look beyond the common-law definition of partnership and allow petitioner to demonstrate that King & Spalding (as is true of many other law

firms) is organized and run in a manner that departs significantly from the common-law model of a "partnership," and has many attributes of a corporation. Judge Edenfield stated:

> Undeniably, a private professional partnership is a voluntary association. . . . Plaintiff's emphasis on the composition and internal arrangements of this particular partnership cannot alter this inescapable conclusion. King & Spalding is a partnership, created and perpetuated as such and subject to the partnership laws of Georgia and the United States. The legal characterization of what an entity is, of course, is purely a question of state law, . . .
>
> These observations effectively dispose of plaintiff's prayers for further discovery.

Id. (R. 265; App. A-19).

In dismissing the complaint, the district court was heavily influenced by what it perceived as an infringement of rights of "freedom of association" of King & Spalding's existing partners that would result if the firm were subjected to the coverage of Title VII and prohibited from using race, sex and religion as criteria in the selection of partners. The court saw itself confronted with the "dilemma" of having to choose between Title VII to cover partnership decisions of large law firms on the one hand—a question which the court said was "doubtful and obscure" —and ruling that Title VII violates "the right of defendant to freedom of association" if Title VII were applied to the selection of partners by King & Spalding from among its associates. *Id.* at 20,064 (R. 271; App. A-24). The court resolved the dilemma by deciding the "doubtful and obscure" question of coverage of Title VII over law firm partnerships against the petitioner, but with the observation that "the court is humbly aware that in reaching this conclusion it may have erred." *Id.*

The district court described its dilemma in the concluding paragraph of the opinion:

> In the end, then, the court faces this dilemma: (1) If the court finds that the case is covered by Title VII the defendant's constitutional right to freedom of association is then thrown into head-on conflict with plaintiff's constitutional right not to suffer discrimination in the terms, conditions and privileges of her employment; (2) if the court construes the Act as not covering plaintiff's claim, then there is no constitutional problem and the court should dismiss the case for want of subject-matter jurisdiction. To the court, while the right of defendant to freedom of association seems clear, the coverage of the Act seems doubtful and obscure. The court is humbly aware that in reaching this conclusion it may have erred. In considering this possibility, the court considered a balancing process which would give effect to both constitutional rights by allowing the case to proceed but would require the plaintiff, in such rare instances, to show by clear and convincing proof that, irrespective of all other justifications claimed by defendant, naked discrimination was the sole and producing cause of plaintiff's rejection as a partner. The court, however, could find no hint of any authority for a trial court to so alter the burden of proof. All of these questions will have to be resolved by a higher authority, legislative or judicial. In the meantime, the court concludes that it has no subject-matter jurisdiction of plaintiff's claim and the case is, therefore, DISMISSED.
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> *Id.* (R. 271; App. A-24, 25).

On appeal, a divided panel of the Eleventh Circuit Court of Appeals affirmed, with Circuit Judge Peter T. Fay and Senior District Judge George C. Young in the majority, and Circuit Judge Gerald B. Tjoflat dissenting. *Hishon v. King & Spalding*, 678 F. 2d 1022 (11th Cir. 1982). The majority ruled:

> **A dismissal under Fed. R. Civ. P. 12(b)(1) is proper only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim, which would entitle [her] to relief." *McLain v.***

> *Real Estate Board of New Orleans, Inc.* . . . Appellant suggests that Title VII must be given the "broadest possible interpretation" in order to effectuate its purpose—to remedy acts of discrimination within the employment context. *Rogers v. EEOC*, 454 F. 2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U. S. 957, 92 S. Ct. 2058, 32 L. Ed. 2d 343 (1972). . . . Even under the most liberal reading we cannot find the requisite congressional intent to permit Title VII's intervention into matters of voluntary association. We can conceive no set of facts which would entitle her to relief under Title VII with respect to partnership decisions. This renders the dismissal of her claim proper.
>
> 678 F. 2d at 1026 (App. A-6).

Although the majority refrained from expressly endorsing the trial court's freedom of association rationale, the majority was heavily influenced by the notion that a partnership is a "voluntary association," and that partners of a "voluntary association" should be free to select those with whom they will "associate" in the practice of law in the absence of clear evidence of "the requisite congressional intent to permit Title VII's intervention into matters of [discrimination by] voluntary association[s]." *Id.*

Judge Tjoflat dissented on the ground that Title VII applies to petitioner's firing as an associate as a direct consequence of King & Spalding's decision to refuse her admission to partnership. Since this decision was alleged to have been based on sex, her firing, therefore, constituted employment discrimination in violation of § 703(a) (1) and § 703(a) (2) of Title VII. 678 F. 2d at 1030 (App. A-15, A-16).

Petitioner's motion for rehearing *en banc* was denied on September 9, 1982. App. A-29. Certiorari was granted by this Court on January 24, 1983. 51 U. S. L. W. 3552.

SUMMARY OF ARGUMENT

The complaint stated a sex discrimination claim under each of three legal theories. *First*, the complaint alleged that the relationship between a partner and a large institutional law firm is primarily one of "employment" which is covered by Title VII. *Second*, the complaint alleged that the opportunity of "making partner" which King & Spalding held out to petitioner and to other associates to induce them to accept employment with the firm was both an "employment opportunity" and a "term, condition and privilege of [her] employment" within the meaning of § 703(a) of Title VII. *Third*, the complaint alleged that petitioner's employment as an associate was terminated by King & Spalding as a direct result of the fact that she had been rejected for partnership because of her sex.

Because the complaint was dismissed under Rule 12(b)(1) for want of subject-matter jurisdiction, the judgment must be reversed "unless it appears beyond doubt that plaintiff can prove no set of facts" under which sex discrimination in the selection of partners by any law firm could ever constitute "employment discrimination" "which would entitle [her] to relief" under Title VII. *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U. S. 232, 246 (1980).

Partnerships are "persons" whose employment practices are covered by § 701(a) of Title VII. King & Spalding employs more than 50 associates and 50 secretarial and clerical personnel and is engaged in the practice of law, "an industry affecting commerce" [*Goldfarb v. Virginia State Bar*, 421 U. S. 773 (1975)], with offices in Atlanta and Washington. King & Spalding is, therefore, an "employer" covered by Title VII and cannot claim either a professional exemption [*Connecticut v. Teal*, 50 U. S. L. W. 4716 (June 21, 1982) (No. 80-2147); *Goldfarb v. Virginia State Bar*, 421 U. S. 773 (1975)] or an exemption based on the fact that it is organized as a partnership.

An associate of a law firm is an "employee" whose "term[s], condition[s] and privilege[s] of employment" and whose "employment opportunities" are protected by Title VII from discrimination on the basis of race, religion, sex, or national origin. *Kohn v. Royall, Koegel & Wells,* 496 F. 2d 1094 (2d Cir. 1974); *Lucido v. Cravath, Swaine & Moore,* 425 F. Supp. 123 (S. D. N. Y. 1977); *Blank v. Sullivan & Cromwell,* 418 F. Supp. 1 (S. D. N. Y. 1975).

The issue in this case is whether acts of sex discrimination practiced by a law firm in refusing to admit female associates to partnership (and the subsequent discharge of those associates who do not "make partner" under an up-or-out policy) constitute "unlawful employment practices" which are prohibited by § 703(a) of Title VII.

In making this determination, it must be remembered that Title VII was "intended to be broadly inclusive" [*County of Washington v. Gunther,* 452 U. S. 161, 178 (1981)], that "Congress required 'the removal of . . . barriers to employment' and *professional development* that had historically been encountered by women, blacks and other minorities" [*Connecticut v. Teal,* 50 U.S.L.W. at 4718 (emphasis supplied)], and that Congress, therefore, "intended to prohibit *all practices in whatever form* which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin . . . [as] the 'highest priority.'" *Franks v. Bowman Transportation Co.,* 424 U. S. 747, 763 (1976) (emphasis supplied).

In enacting Title VII, Congress rejected the narrow common-law definition of "employment" in favor of the more comprehensive and economically realistic definition of employment in the National Labor Relations Act [*NLRB v. Hearst Publications,* 322 U. S. 111 (1944)], the Social Security Act [*United States v. Silk,* 331 U. S. 704 (1947)], and the Fair Labor Standards Act [*Goldberg v. Whitaker House Cooperative, Inc.,* 366 U. S. 28 (1961)].

The petitioner has advanced two basic arguments to support her claim that the provisions of Title VII apply to and were violated by the decision of King & Spalding to deny her promotion to partnership in the firm on account of her sex.

Entity Theory—If King & Spalding were organized as a professional corporation, rather than as a partnership, there would be no doubt that its partner-shareholders would be considered "employees" of the firm for Title VII purposes. Discrimination by a professional corporation in the selection of lawyers for advancement from the "associate" status to that of a "shareholder" is prohibited by Title VII. *Cf. Bonilla v. Oakland Scavenger Co.*, 697 F. 2d 1297 (9th Cir. 1982).

Although King & Spalding is nominally organized as a partnership rather than a professional corporation, it should not be treated differently for Title VII purposes. Large law partnerships "possess many attributes common to corporate forms of business." 678 F. 2d at 1026. In *Bellis v. United States*, 417 U. S. 85, 93-94, 95 (1974), this Court emphasized that "Wall Street law firms . . . are often large, impersonal, highly structured enterprises of essentially perpetual duration" and that even a small law firm with as few as three partners had "an established institutional identity independent of its individual partners."

The conclusion that partnerships should be treated on a parity with corporations for Title VII purposes is reinforced in this case by the fact that King & Spalding has a written partnership agreement. This agreement serves the same function as a corporate charter by eliminating the common-law rules of partnership and replacing them with four principal attributes of incorporation, including (1) a trade name, (2) perpetual existence, (3) centralized management, and (4) limited ownership by partners of firm assets. *Cf. Bellis v. United States*, 417 U. S. at 96 n. 4.

The economic reality of the relationship between a lawyer and a large law firm is primarily one of employment. The professional duties of a lawyer in a large firm are essentially the same whether the lawyer is a "partner" or an "associate." In either case, the lawyer earns a livelihood by performing professional services for clients of the firm. The clients pay the firm for these services and the lawyer is compensated by the firm.

Although a partner is a nominal "owner" of the firm, "there is nothing inherently inconsistent between the coexistence between a proprietary and an employment relationship." *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U. S. at 32. A partner's income from a law firm is ordinary income earned as compensation for individual labors on behalf of the firm and its clients, not as a return on invested capital. A partner in a law firm cannot, for example, increase his share of firm profits simply by increasing the size of his capital account. Moreover, many firms, including King & Spalding, limit a partner's ownership in firm assets on retirement or withdrawal to a portion of that partner's capital account.

It is also irrelevant that partnership positions in King & Spalding are filled by "election" rather than by appointment. *EEOC v. First Catholic Slovak Ladies Association*, 694 F. 2d 1068 (6th Cir. 1982); *Pettway v. American Cast Iron Pipe Co.*, 494 F. 2d 211 (5th Cir. 1974).

Employment Opportunity Theory—In addition to alleging that "partnership" is an employment relationship covered by Title VII, the complaint also alleged (and the answer admitted) that King & Spalding represented to petitioner, and to other young law graduates whom the firm was seeking to recruit, that each associate would be fairly considered for partnership after five or six years of satisfactory employment by the firm. These representations of fair and equal consideration for partnership were

material inducements to petitioner's decision to accept employment as an associate with King & Spalding. By making these representations, King & Spalding made "fair and equal consideration" for partnership both an employment opportunity and a "term, condition and privilege of [her] employment" which petitioner possessed by reason of her employment with King & Spalding as an associate.

"Making partner" represents a promotion from the entry level position of an "associate" to the more-highly compensated and prestigious position of a "partner." Partnership in a law firm is therefore an employment opportunity.

Partnership in a law firm is also a "term, condition and privilege" of employment. *NLRB v. Bell Aircraft Corp.*, 206 F. 2d 235, 237 (2d Cir. 1953) (An employee's "prospects for promotion [are] among the conditions of his employment.") It makes no difference whether promotion would have been to a position that is outside the coverage of Title VII. *Golden State Bottling Co. v. NLRB*, 414 U. S. 168, 188 (1973); *Lucido v. Cravath, Swaine & Moore, supra.* This is especially true in firms like King & Spalding that have "up-or-out" policies, which make attainment of partnership a condition of continued employment. Only partners are allowed to remain with the firm and continue working for (*i. e.*, "representing") clients of the firm instead of being terminated and forced to look elsewhere for professional employment.

Assuming *arguendo* that the relationship between a junior partner and a large law firm is not an "employment relationship" that is itself covered by Title VII, the *opportunity* of being promoted to partnership which King & Spalding held out to all of its associates was a "term, condition or privilege of [the petitioner's] employment" within the meaning of § 703(a) of Title VII, and also an "employment opportunity" covered by the Act.

Termination Theory — The petitioner has also advanced a third claim of wrongful termination resulting from King & Spalding's discriminatory refusal to admit her to partnership under the firm's automatic "up-or-out" policy.

The complaint alleged (and King & Spalding has admitted) that when King & Spalding refused to admit petitioner to partnership because of her sex, this decision resulted automatically in the termination of her employment as an associate under an "up-or-out policy." The complaint expressly alleged that the petitioner's employment as an associate was terminated as a direct result of King & Spalding's decision to refuse to make her a partner in the firm, and that sex was a major factor in its decision. Accepting the allegations of the complaint as true, the effect of such discrimination was automatically to terminate Ms. Hishon's employment as an associate and to "deprive [her] of employment opportunities or otherwise adversely affect [her] status as an employee" of King & Spalding, clear violations of § 703(a) of Title VII. *Lucido v. Cravath, Swaine & Moore, supra.*

The complaint, therefore, stated a claim against King & Spalding for sex discrimination in employment in violation of Title VII and should not have been dismissed for want of subject-matter jurisdiction.

ARGUMENT

I. The Refusal to Apply Title VII to Partnerships Would Be a Significant Blow to the National Goal of Eradicating Job Discrimination.

A. Law Partnerships Are Big Business and Represent Significant Job Opportunities in the Legal Profession.

Partnerships are not outmoded forms of business enterprises suitable only for cottage industries and small family businesses. This Court has recognized that "[s]ome of the most powerful private institutions in the Nation are

conducted in partnership form. Wall Street law firms and stock brokerage firms provide significant examples." *Bellis v. United States*, 417 U. S. 85, 93-94 (1974).[6]

Partnerships occupy a significant segment of the economy and provide a large number of the job opportunities in the United States. In 1979, for example, there were 1,300,000 partnerships in the United States with total revenues of $252.9 billion. U. S. Bureau of the Census, Statistical Abstract of the United States 1982-83, at 528, Table 876 (103 ed. 1983) (hereinafter cited as "Statistical Abstract").

In 1977, the legal profession was a $14.4 billion industry employing 541,000 people; $10.09 billion of the total was received by 29,200 partnerships which employed 197,800 people. Statistical Abstract, 185, 800-01, Tables 311, 1435, 1436. By 1981, the legal profession had grown to a $23.4 billion industry and employed 684,000 people as partners, associates and in secretarial and clerical capacities. Statistical Abstract, 800-01, Tables 1435, 1436.

The major law firms in the United States represent centers of economic and political power far out of proportion to their numbers or their contributions to the GNP. *See Bellis v. United States, supra;* J. Goulden, *The Superlawyers* (1972); P. Hoffman, *Lions in the Street* (1973). King & Spalding's well-publicized connections during the Carter Administration were typical of the influence wield-

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[6]The Big Eight accounting firms are also organized as partnerships. In 1981, the largest in terms of number of partners (Coopers & Lybrand) had 2,010 partners worldwide and revenues of $998 million. The smallest of the Big Eight (Arthur Andersen & Co.) had 1,400 partners and estimated revenues in excess of $973 million. *See* Wayne, *The Year of the Accountant*, N. Y. Times, Jan. 3, 1982, § 3 at 1, col. 2.

ed in Washington, and in state capitals throughout the Nation, by many other large institutional law firms.[7]

In 1982, the law firms included in the National Law Journal's list of the Top 200 law firms employed a total of 28,836 lawyers as partners (12,153) and associates (16,683). These firms ranged in size from Chicago's Baker & McKenzie, which had 236 partners and 377 associates, and operated 28 offices in the United States and in foreign countries, to Boston's Herrick & Smith, which had 80 lawyers. *The Top 200 Law Firms,* National Law Journal, September 13, 1982, at 14, 16, 18-19; September 20, 1982, at 13-16. In 1979, King & Spalding ranked 97th, in 1980 106th, in 1981 98th, and 1982 115th among the Top 200 law firms in total numbers of lawyers. *Id.*; National Law Journal, October 6, 1980, at 32-37; October 13, 1980, at 34-38.

Furthermore, the Top 200 law firms are big businesses relative to the size of most other businesses that are covered by Title VII. For example, King & Spalding had more lawyers in 1980 (102) than 98% of all business "establishments" in the United States had employees.[8] King & Spalding also had more lawyers than 92% of the business "establishments" in the United States meeting the

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[7]King & Spalding partners Griffin Bell and Jack Watson served as Attorney General and as Chief of the White House staff, respectively, during the Carter Administration, while Charles Kirbo, another King & Spalding partner, served in an unofficial capacity as "first friend" of the President. *The First Friend,* Newsweek, Jan. 24, 1977, at 24 (". . . King & Spalding, a Southern gentlemanly law firm in Atlanta . . ."). *See also* Reuters Ltd., Dateline: Atlanta, June 19, 1979 (". . . King & Spalding, one of the best connected law firms in the country . . ."; "King & Spalding, with 107 lawyers, is not the city's largest firm, but its corporate and social ties are perhaps the most venerable.").

[8]U. S. Dept. of Commerce, Bureau of Census, *County Business Patterns—United States,* Table 1B—United States—Establishments, Employees and Payroll by Industry by Employment—Size Class: 1977.

"size of business" test of Title VII had employees. *Id.* Even if only the number of associates employed by King & Spalding (50+) is considered, King & Spalding was still larger than 77% of the business "establishments" in the United States covered by Title VII. *Id.*

B. Employment Discrimination Against Women and Minorities is a Serious Problem in the Legal Profession, Deeply Rooted in its History.

Discrimination against women, blacks, Jews and other minorities has been a persistent part of our nation's history. Despite its motto, "Equal Justice Under Law," the legal profession has not been exempt from discrimination. Although Portia was immortalized by Shakespeare in *The Merchant of Venice,* Mr. Justice Bradley, in the *Myra Bradwell* case, expressed a less favorable attitude toward women lawyers that has continued to prevail more than a century later. In upholding the power of the State of Illinois to refuse to admit women to the practice of law, Mr. Justice Bradley stated in a concurring opinion:

> [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong or should belong to the family institution, is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . . This very incapacity was one circumstance which the supreme court of Illinois deemed important in rendering a married woman incompetent fully to perform

> the duties and trusts that belong to the office of an attorney and counselor.
>
> It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.
>
> *Bradwell v. Illinois*, 83 U. S. 130, 141 (1873).

While the legal obstacles to the admission of women to the bar have been removed, the attitude that women were "incompetent . . . to perform the duties and trusts that belong to the office of an attorney" has remained a formidable obstacle to the advancement of women in the legal profession. Seventy years after *Myra Bradwell*, Judge Phyllis Kravitch, now a member of the Eleventh Circuit, found large law firms to be closed to women lawyers:

> After graduating from the University of Pennsylvania Law School in 1943, one of two women in the class, she was lucky to find a place to practice law—her father's firm in Savannah. At the time, most law firms didn't hire women—not even good students like Judge Kravitch, who had been on the editorial board of the school's law review. Prestigious judicial clerkships were also closed to women then. "When I started practicing law," says Judge Kravitch, "the doors were not only closed, they were locked."
>
> Goolrick, *Equality Under the Law?*, Atlanta J. & Const., June 8, 1980 (Atlanta Weekly Magazine), at 16, col. 3.[9]

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[9]It is no secret that many of the large law firms throughout the United States have been historic bastions of overt discrimination in the employment of women, Jews, blacks and other minorities. *See* C. Epstein, *Women in Law* 82 (1981); P. Hoffman, *Lions in the Street* 11-12 (1973).

As recently as 1950, such prestigious law schools as Harvard did not admit women. C. Epstein, *Women in Law* 50 (1981). Notre Dame law school did not admit women until 1969. Washington and Lee did not do so until 1972. *Id.*

Mr. Justice Bradley to the contrary, the objective data demonstrate that women as a group are as well qualified as men, intellectually and academically, to practice law. A 1972 survey of eight leading law schools found that 53% of the women, and only 35% of the men, enrolled in law school graduated in the top 10% of their undergraduate classes. Stevens, *Law Schools and Law Students*, 59 Va. L. Rev. 572 (1973). A study of LSAT scores reflects that during each year from 1969-73, median LSAT scores of women were consistently *higher* than those of their male counterparts. L. Wightman, *Male-Female LSAT Candidate Study 1969-73*, Educational Testing Service (1974). *See also* C. Epstein, *Women in Law* 56-57 (1981); Barber, *Employment Discrimination Against Women Lawyers*, 59 A.B.A.J. 1029 (Sept. 1973).

The enactment of Title VII marked a turning point in the employment of women in the legal profession. In 1964, there were fewer than 2,200 women (4%) enrolled in accredited law schools. Only 367 women received law degrees in 1965. Statistical Abstract, 168, Table 279. Ten years later, the number of women law students had increased ten-fold to 21,788 and the number of women receiving law degrees increased by 1200% from 367 in 1965 to 4,415 in 1975. In the next five years from 1975 to 1980, the number of women graduating from law schools more than doubled to 10,754. Statistical Abstract, 168, Table 279. By 1981, the number of women studying law had grown to 44,986 or 35% of the total law school enrollments. Association of American Law Schools, *Prelaw Handbook 1982-83*, at 11 (1982).

Despite the objective evidence that women are as well qualified as men to practice law, the attitude expressed by Mr. Justice Bradley persists, and lawyers have been slow to recognize the applicability of Title VII to the legal profession.[10] Although lawyers have long counselled their clients to comply with Title VII, job opportunities for women in the legal profession trailed far behind those of their male counterparts.

Women comprised only 3.8% of the total number of lawyers and judges employed in 1972, eight years after the enactment of Title VII. Statistical Abstract, 388, Table 651. In that year, Ms. Hishon was hired by King & Spalding as only the second female lawyer in that firm's almost 100-year history, and the first since the enactment of Title VII.

Martindale-Hubbell reflects that the first woman employed by King & Spalding was Ms. Antha Mulkey, an honor graduate of the University of Georgia Law School, who was employed as an associate in 1944. Although Ms. Mulkey was sufficiently well qualified to meet King & Spalding's standards for the practice of law—she was employed as an associate for 33 years—she was never admitted to partnership. While she remained as the firm's only permanent associate, more than 50 men who were her juniors were promoted into the partnership.[11]

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[10]Lawyers were equally slow to recognize the applicability of the Sherman Act to the legal profession. *See Goldfarb v. Virginia State Bar*, 421 U. S. 773 (1975). *Cf. Bates v. State Bar of Arizona*, 433 U. S. 350 (1977).

[11]Not all minority-group members were as fortunate as Ms. Mulkey. When Morris Abram returned to Atlanta, after graduating with honors from the University of Georgia and the University of Chicago Law School, and having earned a Rhodes Scholarship, he applied to the firm that was then known as Spalding, Sibley & Troutman and discovered "the awful and inescapable reality that no Jew had ever been employed by that firm, now the renowned King & Spalding of Griffin Bell and Charles Kirbo." M. Abram, *The Day is Short* 62, 95 (1982).

In 1974 and 1975, the Second Circuit and the Southern District of New York upheld sex discrimination claims filed by women lawyers against Wall Street law firms that, like King & Spalding, were organized as partnerships. *Kohn v. Royall, Koegel & Wells,* 496 F. 2d 1094 (2d Cir. 1974); *Blank v. Sullivan & Cromwell,* 418 F. Supp. 1 (S. D. N. Y. 1975). As a result of these decisions, employment of women as associates by law firms has accelerated. Over the nine-year period from 1972 through 1981, the number of women employed in the legal profession as lawyers and judges increased more than three-fold from 3.8% in 1972 to 14.1%. Statistical Abstract, 388, Table 651.

Although Title VII has expanded the entry-level job opportunities for women as associates in law firms, the coveted upper-echelon positions of "partner" in many law firms remain closed to women or are available only on discriminatory terms to the exceptional "Superwoman." C. Epstein, *Women in Law* 53 (1981). As recently as 1979, for example, 90 of the Top 200 law firms (including King & Spalding) had no women partners; 67 other firms on the Top 200 list had only one. C. Epstein, *Women in Law* 175-218 (1981); Epstein, *The Partnership Push,* SAVVY, March 1980, at 29, 35.[12]

A 1982 survey of 151 law firms reflects that there were no women partners in 32 firms, no black partners in 106, and no Hispanic partners in 133 firms. Flaherty, *Women & Minorities: The Gains,* National Law Journal, December 20, 1982, at 1, 8-11. These 151 law firms employed 5% of the lawyers in the entire Nation. This same survey reflects that in June 1982, King & Spalding had only one woman partner, and no black or Hispanic partners. Al-

[12]This historical pattern of discrimination is by no means limited to women. One author has noted that there has been a tendency among Wall Street law firms to hire blacks "only for display purposes or for corporate 'minority affairs,' *i. e.,* contacts with other blacks." C. Clark, *Minority Opportunities in Law for Blacks, Puerto Ricans & Chicanos* 5 (1974).

though women represented more than 30% of those graduating from law schools in 1980 [Statistical Abstract, 168, Table 279], only 7 (13%) of King & Spalding's 53 associates were women. King & Spalding had only one associate who was black (2%), and no Hispanic associates. *Id.* at 10.

These statistics demonstrate that the issue presented in this case is not an isolated act of discrimination by a law firm against a single individual, but is representative of a historical pattern of discrimination that exists in large numbers throughout the Country. Although not by design, this case has become a test case of the rights not only of women, but also of blacks, Jews and other minorities that have historically been excluded from the most highly compensated, prestigious and responsible job opportunities in the private practice of law.

The ultimate issue presented by this appeal can be simply stated:

> Can King & Spalding, or any other law firm that has 15 or more employees, post a sign on the door of its partnership meetings that reads:
>
> KEEP OUT
>
> NO WOMEN, NO BLACKS, NO JEWS ADMITTED

Petitioner believes that the only answer permitted by Title VII to this question is an emphatic "NO" and that the ruling of the court of appeals must be reversed.

II. Because the Complaint was Dismissed for Want of Subject-Matter Jurisdiction, the Judgment Below Must Be Reversed "Unless it Appears Beyond Doubt that the Plaintiff Can Prove No Set of Facts in Support of [Her] Claim" that Sex Discrimination by Law Firms in the Selection of Partners Is Prohibited by Title VII.

In *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 246 (1980), this Court held that the same standards of review apply whether a complaint is dis-

missed under Rule 12(b)(1) for want of subject-matter jurisdiction or for failure to state a claim under Rule 12(b)(6). Such dismissals are not favored and must be reversed "unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief.'" *Id.* at 246 (quoting *Conley v. Gibson*, 355 U. S. 41, 45-46 (1957)).

The judgment below can be affirmed only if there are *no* circumstances under which the discrimination by *any* law firm that is organized as a partnership in the selection of partners can be found to be covered by Title VII. This is especially true in this case, in which the district court not only sustained a facial attack on the complaint, but refused to allow petitioner to obtain relevant discovery concerning the internal structure and operation of King & Spalding to support her claim concerning the coverage of Title VII.

The complaint stated a claim for sex discrimination under Title VII and should not have been dismissed.

III. Discrimination by Law Firms in the Selection of Partners and the Discharge of Those Associates who Fail to Make Partner Because of Sex, Race, Religion, or National Origin, Are "Unlawful Employment Practices" that Are Prohibited by § 703 (a)(1) and (2) of Title VII.

There is no dispute that King & Spalding is a "person" whose employment practices are covered by Title VII. Section 701(a) expressly defines "the term 'person' [to] include . . . partnerships." Nor is there any doubt that King & Spalding is an "employer," is engaged in the practice of law in "an industry affecting commerce" [*see McLain v. Real Estate Board of New Orleans, Inc., supra; Goldfarb v. Virginia State Bar, supra*], and has "fifteen or more employees" and, therefore, meets the size of business test of coverage of Title VII. 42 U. S. C. § 2000e (b).

There is no "professional exemption" that removes lawyers from Title VII, any more than there is a profes-

sional exemption from the Sherman Act. *Goldfarb v. Virginia State Bar, supra.* An associate of a law firm (such as Ms. Hishon was of King & Spalding from April 1972 until her discharge on December 31, 1979) is an "employee" of the firm for purposes of Title VII. 42 U. S. C. § 2000e(f). *Kohn v. Royall, Koegel & Wells, supra; Blank v. Sullivan & Cromwell, supra; Lucido v. Cravath, Swaine & Moore,* 425 F. Supp. 123 (S. D. N. Y. 1977).

The question presented by this case is not whether King & Spalding is an "employer" covered by Title VII, nor whether Ms. Hishon was an "employee" of King & Spalding who was entitled to the protection of Title VII. These points have never been disputed. Rather, the issue is whether the particular acts of sex discrimination, which were alleged to have been practiced against Ms. Hishon by her employer King & Spalding, were *"unlawful employment practices"* within the meaning of § 703(a) of Title VII.

As will be explained in Sections C. 1, C. 2, and D below, sex discrimination by law firms is an unlawful "employment practice" under each of three legal theories: (1) A large partnership is an entity having an identity separate from its individual partners and can be considered an employer of a partner for Title VII purposes; (2) promotion to partnership is a "term, condition or privilege of employment" or an "employment opportunity;" and (3) petitioner's discharge as an associate was the direct result of the discriminatory refusal to promote her to partnership.[13]

A. Title VII is to be Liberally Construed, and Exceptions Are Not to be Read into the Statute Without Clear Congressional Intent.

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[13]Before these three theories are developed in Sections C and D below, two preliminary points must be made. The first concerns the construction of Title VII (Section A), and the second, the definition of "employee" (Section B).

This Court has held that "in enacting Title VII of the Civil Rights Act of 1964, Congress intended to prohibit *all practices* in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin, [citations] and ordained that its policy of outlawing such discrimination should have the 'highest priority.'" *Franks v. Bowman Transportation Co.*, 424 U. S. 747, 763 (1976). There is no doubt that Congress intended to outlaw discrimination in the professions. This Court has recently emphasized that "Congress required 'the removal of artificial, arbitrary, and unnecessary barriers to employment' and *professional development* that had historically been encountered by women, blacks and other minorities." *Connecticut v. Teal*, 50 U.S.L.W. 4716 (June 21, 1982) (No. 80-2147) (emphasis supplied).

This Court has held that "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Andrus v. Glover Construction Co.*, 446 U. S. 608, 616-17 (1980); *Continental Casualty Co. v. United States*, 314 U. S. 527, 533 (1942).

When Congress has intended to exempt certain organizations from Title VII, it has done so by specific exceptions in the statute. For example, Congress exempted employers having fewer than fifteen employees [§ 701(b)], private clubs [§ 701(b)(2)], and persons elected to public office [§ 701(f)] from Title VII's prohibitions against employment discrimination. There is no evidence, however, that Congress intended to exempt partnerships in general or law firms in particular from the coverage of Title VII, and no such exemptions should be implied.

The approach of the court of appeals to the interpretation of Title VII was the opposite of that mandated by

the decisions of this Court. Instead of presuming coverage from the absence of an express statutory exemption for law firms, the majority placed the burden on the petitioner of demonstrating from the legislative history that Congress discussed the subject of discrimination by law firms and other partnerships and specifically intended to cover partnership decisions. Finding an absence of positive evidence of "the *requisite* congressional intent" [678 F. 2d at 1026 (emphasis supplied)], the lower court presumed that Congress intended to leave discrimination in the selection of partners by law partnerships and other "voluntary associations" untouched by Title VII's otherwise comprehensive prohibitions against discrimination in the workplace. The lower court disregarded the teaching of *County of Washington v. Gunther*, 452 U. S. 161 (1981), in which this Court explained that, because Title VII was "intended to be broadly inclusive" [*id.* at 170], the lower federal courts "must therefore *avoid interpretations* of Title VII that deprive victims of discrimination of a remedy, *without clear congressional mandate.*" *Id.* at 178 (emphasis supplied).

B. Economic Reality and Not Common-Law Definitions Determines Whether a "Partner" is an "Employee" of the Firm for Purposes of Title VII.

Title VII defines an "employee" simply as a "person employed by an employer." § 701(f) (42 U. S. C. § 2000e (f)). Although the term "employment" is not explicitly defined in Title VII, it has a well-established common meaning that encompasses the means by which one earns a livelihood. Thus, "employment" is defined in *Webster's Third New International Dictionary* 743 (3d ed. 1976), as an "activity in which one engages and employs his time and energies . . . [for example] *work* (as customary trade, craft, *service* or vocation) *in which one's labor or services are paid for* by an employer." (emphasis supplied.) "Employ" means "to use or engage the services of (a lawyer to

straighten out a legal tangle); also: *to provide with a job* that pays wages or a salary or *with a means of earning a living.*" *Id.* (emphasis supplied).

It does not demean the legal profession to describe the practice of law by lawyers for large law firms as "work" or a "job." Whether a lawyer is a partner or an associate in a law firm, the practice of law involves the performance of personal services of a professional nature by the individual lawyer. As this Court observed in *Bates v. State Bar of Arizona*, it is a "real-life fact that lawyers earn their livelihood at the bar." 433 U.S. at 368. In the case of a sole practitioner, the lawyer earns a livelihood by representing and performing professional services for individual clients. In the case of a lawyer who works for a law firm, the lawyer earns a livelihood by working for clients of the firm, either as a partner or an associate. The labor by which the lawyer earns a livelihood by performing professional services for clients of a firm is, therefore, well within the common, everyday meaning of "employment."

King & Spalding argues that at common law a partnership and its partners were considered as a single entity. Based on this premise, King & Spalding would have the Court conclude that a partner in a large law firm with 50 or even 100 partners—or in the case of a Big Eight accounting firm with as many as 2,000 partners—cannot be considered as an "employee" of the partnership for purposes of Title VII.

Congress did not, however, intend to restrict Title VII's otherwise comprehensive ban on employment discrimination based on narrow common-law concepts of "employment." By enacting Title VII without explicit definitions of "employee" or "employment," Congress intended to use these terms in the same manner as it had used them in the National Labor Relations Act, the Social Se-

curity Act, and the Fair Labor Standards Act. In all three statutes, Congress used the terms "employer," "employee" and "employment" with only the most general definitions or without any definitions at all. Congress was undoubtedly aware, however, that this Court had interpreted the term "employment" in each of these statutes very broadly by looking at the economic reality of a particular relationship, and had rejected attempts to narrow the coverage of those Acts through the use of more restrictive common-law definitions of an "employee." *NLRB v. Hearst Publications*, 322 U. S. 111 (1944) (National Labor Relations Act), *United States v. Silk*, 331 U. S. 704 (1947) (Social Security Act), and *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U. S. 28 (1961) (Fair Labor Standards Act).

In the first of these cases, *NLRB v. Hearst Publications*, this Court established the rationale that was followed in subsequent cases in defining the term "employee" in both the Social Security Act and the Fair Labor Standards Act:

> Congress recognized that economic relationships cannot be fitted neatly into the containers designated "employee" and "employer" which an earlier law had shaped for different purposes . . .
>
> • • •
>
> In this light, the broad language of the Act's definitions, which in terms reject conventional limitations on such conceptions as "employee," "employer," and "labor dispute," leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications.

322 U. S. at 128-29.

Goldberg v. Whitaker House Cooperative [Fair Labor Standards Act] was decided only three years before the passage of Title VII. This Court held that an "owner"

of an enterprise could also be considered an "employee" where the economic reality of the relationship was such that she worked for the enterprise. The Court explained that "ownership" and "employee" status were not mutually exclusive, and that:

> There is nothing inherently inconsistent between the coexistence of a proprietary and an employment relationship. If members of a trade union bought stock in their corporate employer, they would not cease to be employees within the conception of this Act. . . . We fail to see why a member of a cooperative may not also be an employee of the cooperative. In this case the members seem to us to be both "members" and "employees." It is the cooperative that is affording them "the opportunity to work, and paying them for it," . . .
>
> 366 U. S. at 32-33.

This Court has stated that "it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents from this and other federal courts and that it expected its enactment to be interpreted in conformity with them." *Cannon v. University of Chicago*, 441 U. S. 677, 699 (1979). *See also Hargrove v. Oki Nursery, Inc.*, 646 F. 2d 716, 720 (2d Cir. 1980) ("Use of the same language in various enactments dealing with the same general subject matter, . . . [*i. e.*, employment] is a strong indication that the statutes should be interpreted to mean the same thing").

There can be no doubt, therefore, that in enacting Title VII, Congress intended that the term "employee" be interpreted broadly and to reject artificial, common-law concepts of employment in favor of a realistic appraisal of the "underlying economic facts" of a particular relationship. *NLRB v. Hearst Publications, supra.*

C. Discrimination by a Law Firm In the Selection of Partners from Among Its Associates Based on Race, Religion, Sex or National Origin, Violates Title VII.

Title VII coverage of sex discrimination practiced by law firms in the selection of partners from among their associates exists under two distinct legal theories: (1) an "entity theory" under which the partnership is treated as the "employer" of its partners, and (2) an "employment opportunity" theory under which to "make partner" is both an "employment opportunity" and a "term, condition or privilege" of a young lawyer's employment as an associate of a large law firm.[14]

1. The Entity Theory

(a) A large law partnership is an entity that has an institutional identity separate from that of its individual partners and can be considered as the "employer" of a partner for Title VII purposes.

The crux of King & Spalding's position in the district court was that "the firm" and its partners are a single entity and that a "partner" is an owner and cannot be separated from "the firm" or considered an "employee" of "the firm" for purposes of Title VII. These artificial and legalistic distinctions ignore the economic reality of the relationship between an individual partner and a large institutional law firm. A partner, and particularly a junior partner, in many large law firms is in reality a "profit-sharing employee." *City of Wheeling v. Chester*, 134 F. 2d 759, 762 (3d Cir. 1943). *See Armstrong v. Phinney*, 394 F. 2d 661 (5th Cir. 1968) (applying an entity theory to hold a partnership to be the "employer" of a 5% partner for tax purposes).[15] Partnership in a law firm has the primary attributes of employment. Partnership is a job opportunity which enables a lawyer to earn a living by performing professional services for firm clients. The income from the job ends when the partner stops working

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[14]The termination of associates under an up-or-out policy will be discussed in Section D below.

[15]Several well-known law firms have "fired" partners. *See, e. g., Bad Day at Kutak Rock*, National Law Journal, November 2, 1981 at 1, col. 2.

for the firm. Partnership in a law firm is primarily a job opportunity which is readily distinguishable from real estate and other investment partnerships which generate income for partners, not from personal services, but as a return on invested capital.

The authors of a leading textbook on partnerships could have been referring to King & Spalding when they stressed that:

> [N]o corporation is more entity-like than a large law or accounting firm which has been going for generations, often under the name of someone long since dead, with dozens or hundreds of partners (of whom only a handful, as managing partners or an executive committee, make major decisions) . . .
>
> J. Crane and A. Bromberg, *Law of Partnership* 19-20 (1968).

This Court has recognized that "Wall Street law firms . . . are often large, impersonal, highly structured enterprises of essentially perpetual duration," and that even a small law firm with as few as three partners has "an established institutional identity *independent* of its individual partners." *Bellis v. United States*, 417 U.S. at 93-94, 95 (1974) (emphasis supplied). Even the majority in the court of appeals in this case was "well aware that large law partnerships possess many attributes common to corporate forms of business." 678 F. 2d at 1026.

In *Bellis*, this Court enforced a grand jury subpoena which had been served upon a former partner of a small three-partner law firm requiring his production of records of the former partnership (which had been dissolved). This Court rejected Bellis' assertion of the Fifth Amendment privilege against self-incrimination based on his contention that the law firm and its partners were a single entity, and that the business records of the partnership were, therefore, his personal records and protected by the privilege.

In reaching this conclusion, this Court refused to be influenced by technical common-law definitions of the relationship between a partnership and its partners. The Court recognized that the partnership form is, in economic reality, only one of many forms under which business enterprises are conducted, and emphasized *six common attributes* of partnerships and corporations which require that the two organizational forms be treated equally for Fifth Amendment purposes:

(1) That partnerships, like corporations "are often large, impersonal, highly structured enterprises. . . ."

(2) That the particular partnership had been in existence for 15 years and had "essentially perpetual duration."

(3) That the partnership had an "established institutional identity independent of its individual partners," resulting from the fact that, "[t]he firm maintained a bank account in the partnership name, had stationery using the firm name on its letterhead, and, in general, held itself out to third parties as an entity with an independent institutional identity . . ."

(4) That the partnership "employed six persons in addition to its partners, including two other attorneys [*i. e.*, 'associates'] who practiced law on behalf of the firm, rather than as individuals on their own behalf."

(5) That the firm "filed separate partnership returns for federal tax purposes, as required by § 6031 of the Internal Revenue Code, 26 U. S. C. § 6031."

(6) That "State law permitted the firm to be sued . . . in the partnership name, and generally regarded the partnership as a distinct entity for numerous other purposes."

Bellis v. United States, 417 U. S. at 93-97 (emphasis supplied).

These factors apply with much greater force to King & Spalding than to the dissolved three-man law firm of Bellis, Kolsby & Wolf. King & Spalding is a "large, impersonal and highly structured enterprise" with more than 100 lawyers and more than 50 other employees in

secretarial, paralegal and clerical positions, and offices in two cities. During the recent past, the ties between King & Spalding and the Carter Administration were widely publicized, and the firm was recognized as one "of the most powerful institutions in the Nation." King & Spalding has had, in fact, an "essentially perpetual duration" that has extended for almost 100 years; King & Spalding has established for itself an "institutional identity" by holding itself out to the public as practicing law under a trade name, "King & Spalding," which is the name under which the firm was founded in 1885. R. 161; J.A. 153.

(b) King & Spalding's partnership agreement modifies state law to give King & Spalding the essential attributes of incorporation.

A factor present in this case and not present in *Bellis* is the fact that King & Spalding operates under a written partnership agreement that modifies the common law of partnership and gives King & Spalding the principal attributes of incorporation.

A copy of King & Spalding's partnership agreement is in the record (R. 161-72; J.A. 153-64) and was relied on by the petitioner in the district court in support of her Rule 37 motion to compel discovery. R. 159; J.A. 151. King & Spalding's partnership agreement modified the general principles of partnership law in at least five material respects, and replaced them with the principal attributes of ordinary business corporations. As a result of these changes, King & Spalding is a "partnership" in name only, and has all the substantive characteristics of a corporation.

First—King & Spalding has a "charter." While many law firms function under the common law of partnership without written agreements, King & Spalding has adopted a written partnership agreement which modifies the common law and serves the same purposes that a corporate charter serves for a corporation.

In *Bellis,* this Court treated the three-man law firm as a corporation for Fifth Amendment purposes, despite the fact that the firm did not have a written partnership agreement to serve as "a formal constitution or bylaws to govern its internal affairs." 417 U. S. at 96. The Court stressed, however, that the case for treating the law firm as a corporation would have been even stronger if the Bellis firm had operated under a written partnership agreement that "made any material change in the provisions of state law regarding the management and control of the firm or the rights of the other partners. . . . [That fact] would merely reinforce our conclusion that the partnership is properly regarded as an independent entity with a relatively formal organization." 417 U. S. at 96 n. 4.

Second — King & Spalding has perpetual existence. King & Spalding has distinguished itself from a common-law partnership by providing in its partnership agreement that the firm shall have perpetual existence. The agreement recites that "the Firm" has had a continuing existence since 1885, and that its existence is not dissolved by the admission of new partners or the death, withdrawal or expulsion of any of its partners.

> **This firm began business January 1, 1885 under the firm name of King & Spalding . . . and currently the present firm name.**
>
> • • •
>
> **(a) The firm shall continue until dissolved by vote of partners with at least 66-2/3% of the participating units . . . *The firm shall not be dissolved by the withdrawal, incapacity or death of any partner or partners,* . . .**
>
> **R. 161-62; J.A. 153-54 (emphasis supplied).**

In contrast, a common-law partnership is dissolved automatically by the addition, withdrawal or death of one of its partners. O.C.G.A. § 14-8-90 (Ga. Code Ann. § 75-107); *Harwell v. Cowan*, 175 Ga. 33 (1), 165 S. E. 2d 19 (1932).

Third — King & Spalding does business under a trade name. King & Spalding is a trade name that does not refer to any of its living partners. The adoption of a trade name has given the firm an institutional identity that is independent of the individual reputations of the many well-known lawyers who are presently associated with it. Use of a trade name protects the goodwill of the firm against impairment by death and retirement, or the defection of any of its well-known partners to other law firms. Corporations have long recognized the advantages of trade names. Names like "General Motors" or "Coca-Cola" have given these enterprises an identity and continuity apart from the names of individuals who founded them or happened to be their dominant corporate officers or principal stockholders at any given time. By its deliberate use of a trade name, the partnership is attempting to establish and identify itself as the Coca-Cola or General Motors among law firms in Atlanta, if not nationally.

Fourth — King & Spalding has centralized management and control. Management of King & Spalding is vested in a Management Committee which is elected by the partners in substantially the same manner as shareholders of a corporation elect directors. The King & Spalding Management Committee also performs the same functions that a board of directors performs in an ordinary business corporation. While the King & Spalding Management Committee cannot alter the firm partnership agreement (any more than the directors of a corporation can amend its charter), the Management Committee's actions are otherwise binding on the firm unless overridden by a 66-2/3 vote of the partners:

> The management of the firm shall be delegated to a Management Committee comprised of three partners . . . *To the Management Committee the partners delegate full and complete authority and responsibility to make any and all decisions, commitments and contracts with respect to the operation and manage-*

ment of the firm, provided, however, the Management Committee shall not have authority to act in a manner which would require a change in this Partnership Agreement for its accomplishment or implementation. ...*No action taken by the Management Committee may be reversed or changed except by an affirmative vote of partners with 66-2/3% or more of the participating units.*

Partnership Agreement ¶ 14; R. 170-71; J.A. 162-63 (emphasis supplied).

Under common law, partnership decisions are made by a vote of a majority at interest of the partners. O.C.G.A. § 14-8-42 (Ga. Code Ann. § 75-203); *Rogers v. McDonald,* 224 Ga. 599, 163 S. E. 2d 719 (1968).

Fifth — King & Spalding partners do not own a share in the Firm assets. When a lawyer becomes a partner in King & Spalding, he does not acquire a meaningful ownership interest in the underlying firm assets, as does a partner in a common-law partnership. When a King & Spalding partner withdraws or is expelled, he is entitled *only* to a *refund of his invested capital,* and his share of undistributed net earnings.[16] The King & Spalding agreement expressly provides that:

> (a) . . . it is agreed that upon the separation from the firm of any partner, whether by reason of voluntary or involuntary withdrawal or death, his interest in the firm's earnings and assets shall be as follows:
>
> (i) A refund of his cash capital contribution, if the firm's capital is unimpaired (to the extent there is impairment of the firm's capital, such partner shall be refunded only his proportion of unimpaired capital);
>
> (ii) The amount of undistributed net earnings to which he is entitled as shown by the firm's

[16]The only circumstance under which a King & Spalding partner would receive a pro rata share of the underlying assets of the firm would be in the event of a total dissolution.

> records as of the end of the month in which such withdrawal occurs.

Partnership Agreement ¶ 9(a); R. 166-67; J.A. 159.

In contrast, if King & Spalding were a common-law partnership, a withdrawing partner would be entitled to receive a pro rata share of the fair market value of the firm's net assets in excess of its liabilities. O.C.G.A. § 14-8-45 (Ga. Code Ann. § 75-206); *Bryan v. Maddox,* 249 Ga. 762, 295 S.E. 2d 60 (1982). This would include a share of the value of the unbilled time and disbursements, accounts receivable, as well as the value of all leasehold improvements, furniture, fixtures, library, the files, computers and other physical assets.

(c) The fact that a partner in King & Spalding may have a limited "ownership" interest in firm assets or be paid from "profits" does not alter the primary nature of the relationship as one of employment.

King & Spalding argued in the lower courts that because partners are considered as the "owners" of the firm, and are paid from "profits," they cannot be considered as "employees" of the firm for purposes of Title VII. Taken to its logical conclusion, this argument would mean that employees of a corporation would lose the protection of Title VII if they acquired stock under an employee stock ownership plan. This argument is unsound and must be rejected for at least two reasons.

First, the argument ignores the fact that under the terms of the King & Spalding partnership agreement a partner in King & Spalding does not have any meaningful ownership interest in the underlying firm assets. Partnership Agreement ¶ 9(a) (quoted at page 37, *supra;* R. 166-67; J.A. 158-59). When a King & Spalding partner retires, withdraws or is expelled, he is entitled only to a refund of his invested capital, and his share of undistributed net earnings. *Id.*

Second, cases decided by this Court [*Goldberg v. Whitaker House Cooperative, Inc.*, 366 U. S. 28 (1961)], as well as by several lower courts [*Bonilla v. Oakland Scavenger Co.*, 697 F. 2d 1297 (9th Cir. 1982); *EEOC v. First Catholic Slovak Ladies Association*, 694 F. 2d 1068 (6th Cir. 1982); *Pettway v. American Cast Iron Pipe Co.*, 494 F. 2d 211, 264-66 (5th Cir. 1974)] establish that the existence of an ownership interest in a business does not prevent a person from being an "employee" of that business and, therefore, within the protection of federal employment legislation. For example, in *Goldberg v. Whitaker House Cooperative, Inc.*, this Court held that the women who worked at home knitting goods for sale by the cooperative were "employees" of the cooperative for purposes of the Fair Labor Standards Act, notwithstanding the fact that they were also "members" and "owners" of the cooperative. The Court concluded that "[t]here is no reason in logic why these members may not be employees. There is *nothing inherently inconsistent between the coexistence of a proprietary and an employment relationship.*" 366 U. S. at 32 (emphasis supplied).

In *Bonilla v. Oakland Scavenger Co., supra*, the Ninth Circuit held that a membership corporation engaged in the garbage business violated Title VII by giving preference to its stockholders (all of whom were Italian-Americans) in making promotions from "helper" positions to the higher-paid positions as "drivers." The company argued that Title VII did not apply to the exercise of "proprietary rights" by stockholders to promote themselves and their families to higher-paid positions. This argument was rejected by the Ninth Circuit:

> The Company argues that Title VII has no application to discrimination in the sale of corporate stock. Even if this is so, however, it does not help the Company's position here. Since the Company ties preferential wages, hours, and job assignments to ownership of its stock, the shareholder preference plan con-

> stitutes a condition of employment subject to the mandate of Title VII. The Company's organization closely entangles stock ownership and employment privilege, but the predominant characteristics are those of employment. . . . [T]he discriminatory employment practices of the Company are within the reach of Title VII in spite of the effort to characterize those practices as "proprietary rights."
> 697 F. 2d at 1302-03.

In *Pettway v. American Cast Iron Pipe Co., supra,* the Fifth Circuit held that an opportunity to be elected to an "ownership" position in a business which was available only to white male employees and gave them the ability to influence the terms and conditions of their employment was an "employment opportunity" under Title VII that could not be denied black employees. In that case, all of the stock of American Cast Iron Pipe Co. had been conveyed under the will of the company's founder jointly to the members of two committees as trustees for the employees of the company. One committee was called the Board of Management and consisted of corporate officers of the company. The second committee was called the Board of Operatives and consisted of white male employees of the company over 21 years of age elected by non-supervisory employees of the company. The district court held that, although black employees of the company were not "employees" of the Board of Operatives, the opportunity *to be elected* to serve on the Board of Operatives and to influence the management of the company *by voting the shares of stock* held by the Board was so connected with the employment that black employees could not be excluded from becoming trustee-owners of the stock as members of the Board of Operatives. *Pettway v. American Cast Iron Pipe Co.*, 332 F. Supp. 811, 815 (N. D. Ala. 1970). Judge Lynne explained that:

> "[T]he right to serve as a member on the Board of Operatives at Acipco has been, since the inception of

> the Eagan Plan, a valuable term, condition or privilege of employment at Acipco and therefore falls within the express coverage of Title VII, 42 U.S.C.A. 2000e-2(a)."

The court of appeals quoted this portion of the district court's opinion in affirming the ruling of the district court insofar as it had held that black employees could not be denied election to the Board of Operatives. *Pettway v. American Cast Iron Pipe Co.*, 494 F. 2d at 263-64.

In summary, the factors emphasized by this Court in *Bellis* and reinforced by the provisions of the King & Spalding partnership agreement compel the conclusion that "the firm" King & Spalding should be treated as an institution separate from its partners, and as the "employer" of the partners for Title VII purposes. The contrary ruling of the lower court is erroneous and should be reversed.

2. The Opportunity Theory

By holding out to petitioner and to other associates the promise of equal consideration for partnership, King & Spalding made the opportunity of promotion to partnership a "term, condition or privilege" of employment and an "employment opportunity" of its associates that is covered by Title VII.

The complaint alleged that King & Spalding represented to petitioner (and represents generally to other third-year law students and judicial law clerks whom King & Spalding is attempting to recruit) that the associate will be given fair and equal consideration for partnership. Complaint ¶ 8(b), R. 6; J.A. 9-10; Answer ¶ 8(b); R. 26; J.A. 30-31.[17]

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[17]The Court can take judicial notice of the fact that there is vigorous competition among large law firms to employ law students who are at the top of their classes, as was Ms. Hishon. Representations such as those made by King & Spalding to petitioner are essential for any law firm that hopes to recruit bright law students or law clerks. No highly-qualified recruit would accept employment as an associate of even a firm as prestigious as King & Spalding if the firm did not hold out the

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Under the allegations of the complaint, the opportunity of promotion to partnership was not one which King & Spalding held out to the World, but was one which was specifically offered to petitioner by virtue of her status as an associate employed by King & Spalding. Assuming for the sake of argument that partnership in a law firm is not, *per se*, an employment relationship covered by Title VII, by using the prospect of promotion to partnership as an inducement to persuade petitioner and other bright young lawyers to accept employment with the firm and to work hard, King & Spalding has made the opportunity to become a partner both an "employment opportunity" of Ms. Hishon's and other associates and a "term condition or privilege of [Ms. Hishon's] employment" by King & Spalding as an associate, within the coverage of § 703(a) of Title VII, which could not, therefore, be withheld on the basis of sex, race, religion or national origin under Title VII.

An employee's "prospects for promotion [are] among the conditions of his employment." *NLRB v. Bell Aircraft Corp.*, 206 F. 2d 235, 237 (2d Cir. 1953). Even the court of appeals could not "quarrel with the premise that an 'opportunity' can include promotion to a position beyond that of an 'employee' covered by Title VII." 678 F. 2d at 1028.[18]

Furthermore, in the analogous context of employment discrimination in violation of the National Labor Relations Act, this Court has held that, when a promotion is

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prospect of admission to partnership as an inducement. *See, e. g.*, Bower, *A Survival Guide For Associates*, Barrister, Vol. 6, No. 1 (Winter 1979), at 17 ("[a]ttainment of partnership status is a primary motivation for associates. . . .").

[18]The majority below, however, refused to accept the conclusion that Title VII prohibited discrimination in the opportunity to become a partner in a law firm as "encroaching upon individuals' [partners'] decisions to voluntarily associate in a business venture." 678 F. 2d at 1028.

unlawfully denied to an employee who is covered by that Act, the protection of the statute is not lost simply because the position to which the employee would have been promoted (but for the employer's unlawful discrimination) was a "supervisory position" that is outside the coverage of the Act. *Golden State Bottling Co. v. NLRB*, 414 U. S. 168, 188 (1973). In *Golden*, an employee was denied promotion to a supervisory position which was outside the coverage of the NLRA because of his union activities. This Court cited with approval the Second Circuit's decision in *Bell Aircraft* and held that the denial of the promotion based on the employee's union activities violated the Act, even though the position in management of the company was outside the coverage of the Act. The Court quoted with approval the court of appeals, which had stated:

> "The Act's remedies are not thwarted by the fact that an employee who is within the Act's protections when the discrimination occurs would have been promoted or transferred to a position not covered by the Act if he had not been discriminated against. *NLRB v. Bell Aircraft Corp.*, 206 F. 2d 235, 236-237 (2d Cir. 1953)." 467 F. 2d at 166.
>
> 414 U. S. at 188.

In *Lucido v. Cravath, Swaine & Moore, supra*, the district court relied upon this reasoning in refusing to dismiss a Title VII complaint by an associate alleging that he had been denied admission to partnership because of his Italian-Catholic ancestry. Without deciding whether the relationship between partners *inter se* was covered by Title VII, the district court held that the opportunity which Mr. Lucido possessed by virtue of his employment as an associate by Cravath, Swaine & Moore was an "employment opportunity" that was covered by the Act.

> [T]he court need not decide whether Title VII applies to partners *inter se*. However, even assuming that Title VII does not apply to such a relationship, the

protection the Act affords to Lucido for the unlawful discrimination he allegedly suffered as an employee in not being selected for partner solely because he is an Italian Catholic would not be affected. The applicability of Title VII might be different if the defendant were firing a partner or considering a non-associate for partner, but, under the facts in the complaint, *there is a clear employer-employee relationship between Cravath and Lucido and discrimination in a promotional opportunity during that relationship is covered by Title VII.*

The opportunity to be promoted to a position not itself covered by Title VII does not mean that discrimination in that promotion cannot be protected by Title VII.

425 F. Supp. at 128 (emphasis supplied).[19]

King & Spalding has also made partnership "a condition of employment subject to the mandate of Title VII" by tying both Ms. Hishon's continued employment by the

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[19]The opportunity to be considered for partnership is directly affected by the employment opportunities which a young lawyer receives as an associate. The complaint alleged that because she was a woman, King & Spalding treated Ms. Hishon less favorably than male associates by giving her less responsible work assignments (*i. e.*, "woman's work"), which tended to involve smaller matters on which she was required to work alone and without assistance from or being given the opportunity to supervise the work of junior associates. Complaint ¶ 17(d), (e); R. 9; J.A. 13. This discrimination in the quality of work assignments deprived petitioner of the opportunity to demonstrate that she was "partnership material" and tended to make it less likely that she would advance to partnership than King & Spalding's male associates who received better, more responsible work assignments, and plenty of associate help. These were continuing violations of both § 703(a)(1) (*i. e.*, an unlawful discrimination in the "terms, condition or privileges of employment because of . . . sex") and § 703(a)(2) (*i. e.*, an unlawful segregation or classification of employees that tended to "deprive [plaintiff] of employment opportunities or otherwise deliberately affect [her] status as an employee") that adversely impeded her opportunity to be favorably considered for partnership. *Clark v. Olinkraft, Inc.*, 556 F. 2d 1219 (5th Cir. 1977), *cert. denied*, 434 U. S. 1069 (1978).

firm and her advancement to the "preferential wages, hours and job assignments" to attainment of the coveted status of a "partner." *Bonilla v. Oakland Scavenger Co.*, 697 F. 2d at 1302.

The lower court never fully responded to petitioner's contention that King & Spalding's promise of fair consideration for partnership became a "term, condition or privilege" of her employment as an associate. The lower court conceded that it had "serious concerns about any representations made to the appellant regarding her future consideration for partnership" and was "well aware of the significance given a firm's partnership policy by a prospective associate. . . ." 678 F. 2d at 1029. The majority suggested, however, that, "[i]f in fact these representations were deceptively made, then perhaps an action in breach of contract or misrepresentation may provide a more appropriate vehicle for the appellant to drive toward a legal remedy." *Id.* The majority never explained how an express representation of non-discriminatory consideration for partnership could support a contract action by Ms. Hishon as an employee without the promise becoming simultaneously a "term, condition or privilege" of her employment by King & Spalding as an associate.

Pettway and a recent decision of the Sixth Circuit in *EEOC v. First Catholic Slovak Ladies Association, supra*, also dispose of another argument that was relied on by the district court. The district court thought that because partnership positions in King & Spalding were filled by "election," rather than by appointment, they were outside the coverage of the Act.[20] This distinction was rejected

[20]If this were true, many corporate positions would be outside the coverage of Title VII. For example, virtually everyone in a bank from president to assistant cashier is an "officer" and

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by the Sixth Circuit in *First Catholic Slovak Ladies Association*. Under the constitution of the First Catholic Slovak Ladies Association, the salaried officers of the Association were also required to be directors. To be eligible for election as a director, one had to be less than 66 years old. Relying on the ruling of the Eleventh Circuit in *Hishon*, the district court held that the fact of election of directors removed the positions from the coverage of the age discrimination act. The Sixth Circuit reversed and held that:

> [W]hether an individual is an employee and therefore covered by the protections in ADEA should not center on the label which the organization has chosen to give to the position. By emphasizing that these women held elected positions as directors and officers, the District Court failed to assess accurately their true status. These individuals performed traditional employee duties. . . .
>
> 694 F. 2d at 1070.

The teaching of *Pettway* and *First Catholic Slovak* is that when some employees are afforded the opportunity to be elected "owners" or "shareholders" and to participate in the management of the enterprise, the opportunity is both an "employment opportunity" and "a term, condition or privilege of employment" to which Title VII applies. The opportunity to be elected cannot be withheld from other employees on the ground of race, religion, sex, or national origin.

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is elected by the board of directors; the fact that these positions are filled by election does not prevent their occupants from also being "employees" of the bank who are covered by Title VII. A bank can no more exclude blacks from consideration for election to the presidency of the bank than it can exclude them from employment as tellers.

D. King & Spalding's Decision to Deny Plaintiff Admission to Partnership Based on Sex Also Resulted in the Termination of Her Employment as an Associate and thus Violated § 703(a)(1) and (2) of the Act.

In addition to the two theories described above, the complaint also alleged that as a direct consequence of King & Spalding's decision to refuse to admit Ms. Hishon to partnership because of her sex, King & Spalding (a) froze petitioner's compensation as an employee of the firm, and (b) terminated petitioner's employment as an associate pursuant to King & Spalding's admitted "up-or-out" policy. Complaint ¶ 17(b) (c); R. 10; J.A. 12. This claim was separate from the "partnership" claims discussed above, and was dismissed by the district court in a footnote. 25 Empl. Prac. Dec. (CCH) ¶ 31,703 at 20,064-65 n. 1; R. 269; App. A-26.[21]

The complaint expressly alleged that King & Spalding's decision to refuse petitioner's admission to partnership was based on her sex, and these allegations must be accepted as true for purposes of the motion to dismiss. *McLain v. Real Estate Board of New Orleans, supra.* The *result* of the discrimination was, therefore, to "deprive [Ms. Hishon] of employment opportunities or otherwise adversely affect [Ms. Hishon's] status as an employee" of King & Spalding, a violation of the literal language of

[21]In its answer and in the brief and affidavits filed in support of its motion to dismiss, King & Spalding admitted that there was a direct causal connection between King & Spalding's decision not to admit Ms. Hishon to partnership, and the cessation of all raises for petitioner and her ultimate discharge as an associate of the firm on December 31, 1979. J.A. 48, 58, 67. In fact, King & Spalding went to some length to emphasize that it has an "up-or-out" policy and no longer employs "permanent associates" as a matter of policy. *Id.* Thus, King & Spalding argued that, when the decision was made not to admit Ms. Hishon to partnership, her raises stopped and her termination as an associate "within a reasonable period of time" became automatic, under King & Spalding's established "up-or-out" policy. *Id.*

§ 703(a)(2) of the Act. 42 U.S.C. § 2000e-2(a)(2). *See Lucido v. Cravath, Swaine & Moore, supra.*

The district court, however, dismissed this aspect of plaintiff's discrimination claim. The court observed that "this contention will not cut the mustard" because King & Spalding's "long-standing [up-or-out] policies . . . have been uniformly applied by it over the years, for the most part against associates who were male only [*sic*, only male]. Neither in her pleadings, briefs nor arguments does plaintiff even whisper or suggest that such applications by defendant were in any way based on sex." 25 Empl. Prac. Dec. (CCH), at 20,064-65 n.1; R. 269; App. A-26.

The district court missed the point. The thrust of the complaint was that plaintiff did not "make partner" at King & Spalding because she was a woman, and that under King & Spalding's established policy this discrimination also caused both a freeze in her salary advancement as an associate and her discharge as an associate and employee of the firm. That some white male associates at King & Spalding have also been forced to leave the firm when they did not make partner under the firm's "up-or-out" policy is beside the point. Petitioner's male contemporaries did not lose their jobs as associates of King & Spalding because they were males, but for other reasons not covered by Title VII. The complaint alleged that Ms. Hishon lost her job because of her sex.

The court of appeals also rejected the petitioner's claim as a "backdoor" attempt to obtain coverage under Title VII. The majority stated:

> While discriminatory termination alone may have stated a cause of action under Title VII for an unlawful discharge, *Lucido v. Cravath, Swaine & Moore,* when the termination is a result of the partnership decision, it loses its separate identity and must fall

> prey to the same ill-fate as her original attempt to apply Title VII to partnership decisions.
> 678 F. 2d at 1029.

The majority relied on an unprecedented application of the doctrine of assumption of risk in holding that petitioner had no claim under Title VII for wrongful discharge:

> Prospective associates are apprised not only of their potential for partnership, but also of the consequences to be suffered following an unfavorable decision. Just as she accepted a representation made to her concerning partnership consideration, appellant likewise *assumed the risk* that an unfavorable decision would set in motion the termination procedure under the firm's "up or out" policy.
> 678 F. 2d at 1029-30 (emphasis supplied).

Title VII removes discrimination on the basis of race, sex, religion and national origin from the "risks" which "employees" must assume as conditions of employment. Even if petitioner is not entitled to assert a claim under Title VII for denial of admission to partnership, she is at least entitled to assert a claim for wrongful discharge under Title VII based on the theory that King & Spalding's decision to refuse her admission to partnership because of her sex caused her salary as an associate to be frozen and also resulted in her ultimate discharge as an employee of the firm, in violation of § 703(a)(2) of the Act.

CONCLUSION

The decision of the court of appeals below expressly allows large law firms, as well as accounting firms and other businesses organized as partnerships, to discriminate against women, blacks or religious minorities when selections are made among the associates for promotion to partner. The decision below is contrary to the prior de-

cisions of this Court and represents a significant setback in the fight against discrimination. The dismissal of the complaint for failure to state a claim for sex discrimination under Title VII of the Civil Rights Act was erroneous and should be reversed.

Respectfully submitted,

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No. 82-940

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ELIZABETH ANDERSON HISHON,
Petitioner,

v.

KING & SPALDING,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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QUESTIONS PRESENTED

1. Whether law partners organized for advocacy are entitled to constitutionally protected freedom of association.

2. Whether Congress intended, through Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, to give the Equal Employment Opportunity Commission (EEOC), a politically appointed advocacy agency engaged in litigation, jurisdiction over invitations to join law firm partnerships.

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BRIEF FOR RESPONDENT

CONSTITUTIONAL PROVISION

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

STATEMENT OF THE CASE

Respondent King & Spalding, a law partnership, voted on May 26, 1978, not to invite Petitioner, an associate of the firm, to become a partner. Joint Appendix at 56 (J.A.).

On November 19, 1979, 542 days later, Petitioner filed a charge of sex discrimination with the Equal Employment Opportunity Commission (EEOC) against King & Spalding and each partner individually, terming them "employers." J.A. 18, 56. Ten days later, the EEOC issued Petitioner a Notice of Right to Sue. J.A. 24-25.

The Complaint was filed on February 27, 1980. J.A. 1. Count one alleged sex discrimination with respect to "compensation, terms, conditions and privileges of employment and employment opportunities" in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* J.A. 7.[1] Specifically, the Complaint alleged that associates whose work was "satisfactory" were "made partners as a matter of course." J.A. 9. Yet,

---

[1] Counts two and three, alleging violations of the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1), and breach of contract, were dismissed without prejudice. *Hishon v. King & Spalding*, 678 F.2d 1022, 1025 n.5 (11th Cir. 1982). Regarding equal pay, Petitioner's "compensation . . . exceeded the highest compensation paid by King & Spalding to any other associate." J.A. 55.

"[d]efendant failed and refused to offer plaintiff a promotion to partnership." J.A. 12.[2]

The Complaint, which alleged that "[d]efendant discharged plaintiff as its employee," J.A. 12, did not mention an up-or-out policy.[3] Petitioner first referred to it in a brief filed on June 23, 1980. J.A. 165. In a letter to the district court, this brief was cited as the source of Petitioner's claims regarding the policy.[4]

In its Answer, King & Spalding stated that Petitioner's "claims under Title VII . . . are barred because an invitation to partnership is not an employment practice . . . subject to Title VII." J.A. 27, 29.

King & Spalding also stated that associates are not invited to become partners " 'as a matter of course' " or with "only 'satisfactory' evaluations." J.A. 31. Petitioner was rated "good" but neither "very good" nor "outstanding" during the first two years and was told during the next two years "that she was in a middle category." In the fourth year, Petitioner was advised "that she needed to develop a more practical approach to clients' problems"; in the fifth year, she was told that she would

---

[2] Petitioner "elected to refrain from litigating . . . [allegations of] individual instances [of discrimination]." *Hishon v. King & Spalding*, 678 F.2d 1022, 1029 n.13 (11th Cir. 1982). Petitioner "does not desire a remand . . . to afford . . . an opportunity to try any other Title VII claims based on individual episodes of sex discrimination." *Id.* at 1025 n.4.

[3] The Eleventh Circuit considered the up-or-out policy to be a jurisdictional basis. *Hishon v. King & Spalding*, 678 F.2d 1022, 1026 (11th Cir. 1982).

[4] Letter from Emmet J. Bondurant, II, to Hon. Newell Edenfield (Nov. 18, 1980). This letter, referenced in the decision of the district court, *Hishon v. King & Spalding*, 24 Fair Empl.Prac.Cas. (BNA) 1303, 1305 n.1 (N.D.Ga. 1980), is contained in the district court file, but is not in the Joint Appendix or Record. "Courts are particularly apt to take notice of material in court files." 1 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 201[03], at 201-29 (1982); *see, e.g., Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 156-57 (1969) (Court's own records); *Wells v. United States*, 318 U.S. 257, 260 (1943) (records of another court).

"probably not" be invited to become a partner; in the sixth year, she was told that she had not been invited to become a partner; and in the seventh year, she was told that the firm had voted not to reconsider its previous decision. J.A. 32, 33, 34.

At King & Spalding, a number of lawyers, "by virtue of their experience and achievements at the bar, have been invited to partnership directly." J.A. 45. However, "most of the lawyers considered for partnership are considered . . . after working at the firm as an associate for a number of years."[5]

On March 31, 1980, King & Spalding filed a motion to dismiss, contending, among other things, that Petitioner's charge was untimely filed and that an invitation to join a law partnership is not covered by Title VII. J.A. 41-42. That day, King & Spalding also filed a notice to take Petitioner's deposition to ascertain "whether plaintiff has properly invoked the jurisdiction of this Court by timely filing a charge of discrimination with the Equal Employment Opportunty Commission within 180 days of any alleged act of discrimination by defendant." J.A. 79.

Also on March 31, 1980, counsel for the Petitioner wrote to the district court seeking a deferral of "discovery on other issues until the threshold issues have been resolved." J.A. 80-81. The letter stated:

> [W]e recognize that discovery in this case is likely to involve some of the most private and sensitive decisions that a law firm makes . . . .
>
> I don't want to be forced to explore these sensitive issues by discovery unless it becomes necessary to do so in the course of the litigation—nor do I want

---

[5] [T]he lawyer . . . is evaluated by . . . inquiry into . . . the lawyer's technical skill, leadership, ability to attract and handle a client's work in an outstanding manner, ability to deal with other lawyers both within and without the firm, and a general compatibility with the lawyers in the partnership.

J.A. 45.

> King & Spalding to feel that discovery into their private affairs is being used as any kind of lever to coerce the firm to settle a claim which it believes to be without merit.
>
> For these reasons, I want to take the unusual step of proposing procedures . . . justified by the nature of the parties and the issues.

J.A. 81-82.

After setting forth Petitioner's view of the threshold issues, the letter continued:

> I recognize that any law firm would be reluctant to disclose matters relating to the profitability and the method of determining the amount and trends of partnership income to other lawyers even under a protective order.
>
> So that no one will feel that we are attempting to take unfair advantage of this fact in order to put pressure on the defendant, we would propose that the Court . . . stay discovery as to damages until liability has first been determined in favor of the plaintiff.
>
> . . . .
>
> It is inevitable that many of the facts that are likely to be disclosed during merits discovery may, potentially at least, be embarrassing to many fine lawyers who were formerly or are presently practicing with King & Spalding. To avoid unnecessarily embarrassing any of these members of the Bar, I believe that the Court should enter a comprehensive protective order placing all answers to interrogatories by either side, the depositions and documents (and perhaps even briefs and transcripts of any hearings) under seal. The Court may also want to consider holding all hearings *in camera*.
>
> In short, we are prepared to agree to any reasonable protective order, so that the case can be litigated fully and fairly, without any party being under any pressure to avoid publicity or public embarrassment.

J.A. 83-84.

Petitioner sought no depositions, relying instead on requests for production of documents and interrogatories which included the following:

> 3.(e) Please identify all documents received by defendants from clients . . . that refer to or comment upon the quality of plaintiff's work as a lawyer, her personal attributes, her progress toward or eligibility for partnership, or her relative merits in comparison with other associates.
>
> . . . .
>
> 4. If you contend that defendant's decision . . . was based on any specific errors, omissions or deficiencies in plaintiff's performance . . . in representing or on behalf of any clients of defendant, please identify each such matter by stating:
>
> (1) the name of the client;
>
> (2) the name of the matter;
>
> (3) the file or other identifying number of the matter; and
>
> (4) describe the specific error, omission or other difficulty in plaintiff's performance; and
>
> (5) identify (A) the persons whom defendant contends have personal knowledge of the facts . . . in connection with a specific matter or client, and (B) the documents that defendant contends refer to, reflect or evidence any error, omission or deficiency in plaintiff's performance.

J.A. 97, 99-100.

Interrogatories 3(e) and 4 were not answered and Petitioner's deposition was not taken because the district court limited discovery to whether "Title VII . . . appl[ies] to the decisions of defendant with respect to the plaintiff." J.A. 86-87.[6] Internal memoranda setting forth the law firm's organization were provided.

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[6] Four and one-half months were allowed for discovery. J.A. 86; Record at 261.

J.A. 115-23. A complete copy of King & Spalding's partnership agreement also was produced. J.A. 153-64. The only matters excised from it were the "participating units" of ownership of the individual partners. J.A. 155-56. A copy without those deletions was provided to the district court *in camera*. J.A. 237.

The EEOC moved to participate as amicus curiae, J.A. 109, and later sought "access to information regarding King & Spalding's structure and operations." J.A. 150; *see* J.A. 252-53.

The court granted the EEOC's motion to participate as amicus curiae but denied it access to discovery. J.A. 218-19.

On November 26, 1980, a judgment was entered dismissing the Complaint. J.A. 259.

On appeal, the EEOC again unsuccessfully sought access to the record, filed a brief as amicus curiae, and participated in oral argument. J.A. 5.

The Eleventh Circuit affirmed the dismissal, holding that "Title VII does not apply to those decisions dealing with the formation of partnerships." *Hishon v. King & Spalding*, 678 F.2d 1022, 1030 (11th Cir. 1982).

SUMMARY OF ARGUMENT

Lawyers are advocates, essential to the system of justice. They are provided the highest degree of associational freedom. To defend the rights of American citizens, lawyers must be free from private and governmental pressures, including the pressure to accept unacceptable lawyers as partners. Although not above the law, "lawyers do differ from other callings. 'This is not a fancied conceit, but a cherished tradition . . . .'" *Bates v. State Bar*, 433 U.S. 350, 401 n.11 (1977) (Powell, J., concurring in part and dissenting in part) (quoting H. Drinker, Legal Ethics 211 (1963)).

To the Petitioner, cherished traditions are antiquated, and law partnerships are big business—in effect, corporations. Thus, Petitioner and the EEOC, a politically appointed advocacy agency of the Government, seek Title VII coverage of invitations to join law partnerships.

The application of Title VII to the election of law partners would inject the EEOC into decisions regarding the ownership and internal structure of law firms. For law firms, this would create the appearance of a conflict between defense of their clients and defense of their firms because the EEOC is a party-plaintiff in actions against the clients of law firms. Additionally, discovery would destroy the confidentiality inherent in the attorney-client relationship. These concerns, the familiarity of Congress with law partnerships, and the inevitability of remedial problems demonstrate the unlikelihood that Congress intended that Title VII apply. This is especially true because the central characteristic of partnerships in all fifty states is *voluntary* association.

In fact, law partners were regarded as "so clearly outside the Act that no specific exclusionary provision was thought necessary." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 283 (1974) (discussing exclusion of managers from the National Labor Relations Act (NLRA)).

This was the EEOC's position immediately after Title VII became law. In a series of General Counsel opinions, reporting instructions to employers, and Commission decisions, the agency repeatedly found partners were not employees within the meaning of the Act.

"Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). In 1972, Congress reexamined Title VII, but did not amend it to include law partners or partnership decisions.

Because partnership in a law firm is not employment, an invitation to partnership is neither an *"employment* opportunit[y]" nor a term, condition, or privilege "of *employment*." 42 U.S.C. § 2000e-2(a)(1), (2) (emphasis added).[7]

Although Petitioner stresses the beneficent purposes of Title VII, "[e]xperience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting), *overruled*, *Katz v. United States*, 389 U.S. 347 (1967).

Petitioner's case rests on inaccurate stereotypes, incorrectly assumes that discrimination against women lawyers is widespread, and ignores the competition among large law firms for top legal talent and the encouragement women lawyers have received from an independent bar. More than a decade ago, the American Bar Association (ABA) "strongly condemn[ed] all forms of discriminatory hiring practices within the legal profession, whether on the basis of sex, religion, race, or national origin." ABA, Reports of the American Bar Association 154 (1972).

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[7] Petitioner's third "theory," that termination under King & Spalding's up-or-out rule is itself actionable, is precluded by this Court's decision in *Delaware State College v. Ricks*, 449 U.S. 250 (1980). *Ricks* holds that it is the denial of tenure and not the "delayed, but inevitable, consequence of the denial of tenure" that is the unlawful act. *Id.* at 257-58; *accord Chardon v. Fernandez*, 454 U.S. 6, 8 (1981).

Apart from this failure of Petitioner's "test case," Petitioner's Brief at 23, Petitioner's charge was filed on November 19, 1979, 542 days after King & Spalding decided in May 1978 not to invite Petitioner to become a partner. J.A. 56. Thus, Petitioner's suit is time-barred. 42 U.S.C. § 2000e-5(e).

There is no grant of authority to law firms to discriminate. If law partnerships refuse to live up to their agreements with their associates, purely private actions such as breach of contract are available.[8] The Reconstruction Acts, 42 U.S.C. §§ 1981 and 1982, appear to provide black associates an adequate remedy that involves no direct participation by any agency of the Executive Branch.

Since this Court's decisions in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), and *Bates v. State Bar*, 433 U.S. 350, commercialization and bureaucratization have rapidly taken hold of the practice of law, resulting in a loss of idealism in the profession. A decision for Petitioner and the EEOC would accelerate this trend and "force the Bar to become a group of thoroughly orthodox, time-serving, government-fearing individuals." *In re Anastaplo*, 366 U.S. 82, 115-16 (1961) (Black, J., dissenting).

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[8] *Hishon v. King & Spalding*, 678 F.2d at 1029.

ARGUMENT

I. THE ASSOCIATIONAL FREEDOM OF ADVOCATES MUST BE CONSIDERED WHEN DECIDING WHETHER CONGRESS INTENDED TO ALLOW THE EEOC TO REVIEW INVITATIONS TO PARTNERSHIP

Law firms, like law schools, are made up of "those qualities which are incapable of objective measurement," including "reputation . . . , experience . . . , position and influence . . . , standing . . . , traditions and prestige." *Sweatt v. Painter*, 339 U.S. 629, 634 (1950). They are totally dependent upon "quality and character." *McKissick v. Carmichael*, 187 F.2d 949, 952 (4th Cir.), *cert. denied*, 341 U.S. 951 (1951).

"[A]lthough the law is a highly learned profession, . . . it is an intensely practical one." *Sweatt v. Painter*, 339 U.S. at 634. It is highly competitive. "Moreover, it is of specific value that [law] students form acquaintances with the persons who will later occupy positions of influence and power in the profession and in the public life of the state." *McKissick v. Carmichael*, 187 F.2d at 952. Not even legal education can "be effective in isolation from the individuals and institutions with which the law interacts." *Sweatt v. Painter*, 339 U.S. at 634. Association with those who are "lawyers, . . . judges and other officials" with whom "one must deal in practice is essential to legal education." *Id.* "To know and to be known by the dominant figures of the commonwealth facilitates private as well as public business . . . ." *McKissick v. Carmichael*, 187 F.2d at 952.

The law treats lawyers separately because they are "entrusted with a client's confidences, aspirations, freedom, life itself, property and the very means of livelihood." *Baird v. State Bar*, 401 U.S. 1, 20 (1971). "As a profession, lawyers do differ from other callings. 'This is not a fancied conceit, but a cherished tradition, the

preservation of which is essential to the lawyer's reverence for his calling.'" *Bates v. State Bar*, 433 U.S. at 401 n.11 (Powell, J., concurring in part and dissenting in part) (quoting H. Drinker, Legal Ethics 211 (1963)).

Petitioner and amici curiae have a different emphasis. They stress "economic realities" as they attack King & Spalding and other large law firms. They see them as "centers of economic and political power." Petitioner's Brief at 16. Inadvertently stressing first amendment freedom, Petitioner cites "King & Spalding's well-publicized connections during the Carter Administration [which] were typical of the influence wielded in Washington, and in state capitals throughout the Nation, by many other large institutional law firms." *Id.* at 16-17.[9]

To Petitioner, law firms are "Big Business," *id.* at 15,[10] "'large, impersonal, and highly structured enter-

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[9] Petitioner seems to believe that no judge of the Eleventh Circuit voted for rehearing *en banc* because they "may have disqualified themselves," due to a personal or political relationship with King & Spalding partners Griffin B. Bell and Charles H. Kirbo. Petition for a Writ of Certiorari at 10 n.5 (Dec. 3, 1982). Under that standard, three aditional members of this Court would have recused themselves in *United States v. Nixon*, 418 U.S. 683 (1974), and 40 of the 51 women who serve as federal judges (78%) and 38 of the 52 black federal judges (73%) would have to recuse themselves whenever former Attorney General Bell's and Mr. Kirbo's firm comes to court. Cohodas, *Reagan's Judicial Selections Draw Differing Assessments*, 41 Cong. Q. Weekly Rep. (Jan. 15, 1983); information supplied by the Administrative Office of the United States Courts, compiled from Department of Justice information.

[10] Amici agree. *See, e.g.*, Brief Amicus Curiae of the Women's Bar Associations of Illinois and New York at 17 (May 11, 1983) (Illinois and New York Women's Brief) ("[T]he . . . largest are multimillion dollar commercial enterprises."); Motion for Leave to File and Brief of Robert Abrams, *et al.*, at 21 (May 9, 1983) (Abrams Brief) ("Larger business organizations—including partnerships—cannot, therefore, rely on associational claims to avoid the statutory proscriptions against discrimination."); *id.* at 32 (em-

prise[s],'" *id.* at 33, and "historic bastions of overt discrimination in the employment of women, Jews, blacks and other minorities." *Id.* at 19 n.9 (citation omitted). Law practice is "'work' or a 'job,'" *id.* at 28, so that "[p]artnership in a law firm is primarily a job opportunity . . . readily distinguishable from real estate and other investment partnerships," *id.* at 32, because the income is derived from personal services rather than capital.[11]

To King & Spalding, however, the right of law partners to choose those with whom they will share ownership, responsibility, duty, "reputation . . . , experience . . . , position and influence . . . , standing . . . , traditions and prestige," *Sweatt v. Painter*, 339 U.S. at 634, for a lifetime of law practice is of deeper significance.[12] The selection of law partners without governmental intrusion is essential to lawyer advocacy. The Government, in the form of the EEOC, is an advocate with charging,

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phasis in original) ("[I]t is a *commercial enterprise*—a law firm—whose associational interests are at stake."); *id.* at 36 ("Law firms are businesses."); *see also* Brief *Amicus Curiae* for American Association of University Women, *et al.*, at 51-52 (May 12, 1983) (AAUW Brief); Brief of Women's Bar Association of Massachusetts as Amicus Curiae at 20 (May 10, 1983) (Massachusetts Women's Brief); Brief *Amici Curiae* of the Anti-Defamation League of B'nai B'rith and the American Jewish Congress in Support of Petitioner at 14 (May 12, 1983) (ADL Brief); Brief *Amici Curiae* for California Women Lawyers, *et al.* at 20 (May 12, 1983) (California Women's Brief); Brief of the American Civil Liberties Union as *Amicus Curiae* in Support of Petitioner at 40-41 (May 10, 1983) (ACLU Brief); Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae Supporting Reversal at 15 n.6 (May 1983) (EEOC Brief).

[11] If profit is the dominant motive of male partners, as Petitioner suggests, it logically follows that decisions as to who should be invited to become partners will be based upon monetary considerations rather than sex or other personal values.

[12] *Branti v. Finkel*, 445 U.S. 507, 521 (1980) (Stewart, J., dissenting) (One "can think of few occupational relationships more instinct with the necessity of mutual confidence and trust than [the] professional association" of a "firm of lawyers.").

investigative, and litigative duties. If Title VII is applied to the partnership decision, the EEOC's discharge of its statutorily-imposed duties will improperly intrude on law firms' freedom of association, which is protected by the Constitution of the United States,[13] and will strike at the very hand that holds the shield against the Executive Branch of Government.[14]

Petitioner asserts that "[t]he professional duties of a lawyer in a large firm are essentially the same whether the lawyer is a 'partner' or an 'associate.' In either case, the lawyer earns a livelihood by performing professional services for clients of the firm." Petitioner's Brief at 13. Consistent with this theory, Petitioner could have added that the duties of judges and law clerks "are essentially the same" for each performs "professional services."

It is the members of law partnerships, however, who are charged with ultimate responsibility, ultimate liability, and ultimate duty. Partners teach young lawyers. They engage in daily reviews of an associate's work.[15]

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[13] "It is well settled that this Court will not pass on the constitutionality of an Act of Congress if a construction of the statute is fairly possible by which the question may be avoided." *United States v. Clark*, 445 U.S. 23, 27 (1980); *NLRB v. Catholic Bishop*, 440 U.S. 490, 506-07 (1979) (Court refused to extend the NLRB's jurisdiction to include teachers in church-operated schools "in the absence of a clear expression of Congress' intent" because such a construction "could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses." The Court's conclusion was fortified by "[t]he absence of an 'affirmative intention of the Congress clearly expressed.'").

[14] "It is a fair characterization of the lawyer's responsibility in our society that he stands 'as a shield,' . . . in defense of right and to ward off wrong." *Schware v. Board of Bar Examiners*, 353 U.S. 232, 247 (1957) (Frankfurter, J., concurring).

[15] *See* Schwartz, *The Reorganization of the Legal Profession*, 58 Tex.L.Rev. 1269, 1283, 1284 (1980) ("one of [the large law firm's] important characteristics is the exposure of each lawyer's performance to other firm lawyers . . . . The large firm lawyer has a definite peer group—the firm itself. The ethical behavior of that lawyer,

Partners have wider knowledge of the client's affairs and fashion legal approaches to fit the client's overall needs. Unlike a partner, an associate "does not violate the rules of professional conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional liability." Model Rules of Professional Conduct Rule 5.2(b) (Proposed Final Draft 1981). As an amicus curiae brief explains, " 'Supervision limits [the associate's] personal responsibility and individual authority.' . . . '[A]n associate [is in] an apprenticeship.' " California Women's Brief at 7 (citations omitted).

A. Even Non-Lawyer Partnerships That Are Purely Commercial Have a Constitutionally Protected Right of Association

The first amendment's protection of free expression extends to commercial speech.[16] Similarly, the right of commercial association is entitled to protection.

> The idea is not sound . . . that the First Amendment's safeguards are wholly inapplicable to business or economic activity. And it does not resolve where the lines shall be drawn in a particular case merely to urge . . . that an organization for which the rights of free speech and free assembly are claimed is one "engaged in business activities" or that the individual who leads it in exercising their rights receives compensation for doing so. Nor, on the other hand, is the answer given . . . by ignoring the organization's economic function . . . .

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like his competence, receives review by those above him or her in the hierarchy, without breach of client confidence."); C. Epstein, Women in Law 14 (1983) ("Monitoring of the professions is accomplished by peer review and control, with emphasis on informal as well as formal rules and constraints.").

[16] *See, e.g., Bolger v. Youngs Drug Products Corp.*, 51 U.S.L.W. 4961 (U.S. June 24, 1983); *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980); *Bates v. State Bar*, 433 U.S. 350; *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel, Inc.*, 425 U.S. 748 (1976).

> These comparisons are at once too simple, too general, and too inaccurate to be determinative.

Thomas v. Collins, 323 U.S. 516, 531 (1945).[17]

Recently, in *United Brotherhood of Carpenters, Local 610 v. Scott*, 51 U.S.L.W. 5173, 5175 (U.S. July 5, 1983), this Court wrote of the right to associate for economic purposes as having "its source in the First Amendment." The court of appeals had specifically rejected the contention that there was no such right. *Scott v. Moore*, 680 F.2d 979, 990 (5th Cir. 1982) (*en banc*), *rev'd on other grounds sub nom. United Brotherhood of Carpenters, Local 610 v. Scott*, 51 U.S.L.W. 5173.

Like commercial speech, commercial association may not be unreasonably regulated.[18] The permissible degree of governmental interference should be narrow when close, personal relationships touching upon interests in property are also implicated. "[I]t is the constitutional right of every person . . . to choose his social intimates and *business partners* solely on the basis of personal prejudices . . . . These and other rights pertaining to privacy and private association are themselves constitutionally protected liberties." *Bell v. Maryland*, 378 U.S. 226, 313 (1964) (Goldberg, J., concurring) (emphasis added). As Justice Powell stated:

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[17] *Cf. Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978) ("it is untenable that the ban on warrantless searches was not intended to shield places of business as well as of residence"); *See v. City of Seattle*, 387 U.S. 541, 543 (1967) (a "businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property").

[18] To restrict the corollary right of commercial speech, the government must show that the restriction directly advances, in a manner no more extensive than necessary, a substantial governmental interest. *Bolger v. Youngs Drug Products Corp.*, 51 U.S.L.W. 4961, 4963 (U.S. June 24, 1983); *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 564 (1980).

> In certain personal contractual relationships, . . . where the offeror selects those with whom he desires to bargain on an individualized basis, or where the contract is the foundation of a close association[,] . . . there is reason to assume that, although the choice made by the offeror is selective, it reflects "a purpose of exclusiveness" . . . . Such a purpose, certainly in most cases, would invoke associational rights long respected.

Runyon v. McCrary, 427 U.S. 160, 187-88 (1976) (Powell, J., concurring).

"'[A]n essential element of individual property is the legal right to exclude others from enjoying it.'" *Kaiser Aetna v. United States*, 444 U.S. 164, 180 n.11 (1979) (quoting *International News Service v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting)). Construing Title VII to encompass Petitioner's claim would abrogate this right.[19]

> I believe that, whether this Court likes it or not, the Constitution recognizes and supports the concept of private ownership of property. The Fifth Amendment . . . means to me that there is no right to picket on the private premises of another to try to convert the owner or others to the views of the pickets. It also means, I think, that if this Court is going to arrogate to itself the power to act as the Government's agent to take . . . property to give to the pickets for their use, the Court should also award . . . just compensation for the property taken.

Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 330 (1968) (Black, J., dissenting), *overruled*, *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972). Justice Black's dissenting view was vindicated in *Hudgens v. NLRB*, 424 U.S. 507 (1976).

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[19] It also would be contrary to the legislative history of Title VII. *See* 110 Cong.Rec. 13,081 (1964) (remarks of Senator Clark) ("Still, the bill would not do a single thing to a property right.").

B. As Advocates, Lawyers Are Entitled to the Highest Degree of Associational Freedom

Lawyers are advocates of "both public and private points of view"; their "freedom to engage in association . . . is an inseparable aspect of the 'liberty' assured by the Due Process Clause"; and "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).[20]

"While the freedom of association is not explicitly set out in the [First] Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition."[21]

Freedom of association necessarily includes the right to select those who will constitute the associational group. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. at 466 (the right of association is the "right . . . to pursue . . . lawful private interests privately and to associate freely with others in doing so").

Lawyers are required "to represent . . . clients zealously within the bounds of the law." Model Code of Professional Responsibility EC 7-1 (1980). Whether "[l]aw firms are businesses"[22] or not, "the business" of law

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[20] *Cf. Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) ("we have protected forms of 'association' that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members").

[21] *Healy v. James*, 408 U.S. 169, 181 (1972); *see, e.g., Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 543-44 (1963); *NAACP v. Button*, 371 U.S. 415, 430 (1963); *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 296 (1961); *Bates v. City of Little Rock*, 361 U.S. 516, 522-23 (1960); *see also* 1 A. de Tocqueville, Democracy in America 193 (J. Lawrence ed. 1969) ("The most natural right of man, after that of acting on his own, is that of combining his efforts with those of his fellows and acting together. Therefore the right of association seems . . . by nature almost as inalienable as individual liberty.").

[22] Abrams Brief at 36.

firms is advocacy.[23] They are bound by bonds of trust and confidence, and their expression and association are protected from governmental intrusion. *See NAACP v. Button*, 371 U.S. 415, 429 (1963).

In *Button*, this Court found "that the activities of the NAACP, its affiliates and *legal staff*" to vindicate the constitutional and other rights of persons seeking legal redress were a protected "mode[] of expression and association." *Id.* at 428-29 (emphasis added).[24] *Button* was not limited to political issues. " 'Great secular causes, with small ones, are guarded.' " *UMW v. Illinois State Bar Association*, 389 U.S. 217, 223 (1967) (citation omitted).[25]

Lawyers represent their clients in secular causes, great and small, before courts, legislatures, and administrative agencies. They appeal to juries and to judges, to Congresses and to conventions, to justices of the peace and to departments of defense. They seek liberty and property for individuals and corporations, rich and poor, guilty and not guilty. They fight against one government

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[23] Practice of law . . . embraces . . . transactions [that] may have no direct connection with court proceedings, [for] they are always subject to becoming involved in litigation. . . . These "customary functions of an attorney or counsellor at law" . . . bear an intimate relation to the administration of justice by the courts . . . .

In re Opinion of the Justices, 289 Mass. 607, 613-14, 194 N.E. 313, 317 (1935); *see Stanton v. Embrey*, 93 U.S. 548, 557 (1877).

[24] In describing the ways in which lawyers from the NAACP or the NAACP Legal Defense and Education Fund, Inc., were called into the litigation, the Court stated that "[i]n effect . . . the prospective litigant retains not so much a particular attorney as the 'firm' of NAACP and Defense Fund lawyers, which has a corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation." *NAACP v. Button*, 371 U.S. at 421-22.

[25] *See United Transportation Union v. State Bar*, 401 U.S. 576 (1971); *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964).

for another government or against all governments for their clients. They do this in and out of court, and, in all societies, those who advocate are always at risk. Their associational freedom is entitled to the highest degree of constitutional protection.

II. THE EXECUTIVE BRANCH MUST NOT BE ALLOWED TO ENCROACH UPON THE INDEPENDENCE OF LAW FIRMS

A. The EEOC Is an Advocacy Agency

Congress vested the EEOC, a politically appointed agency of the Executive Branch, with enforcement responsibility for Title VII. A former Chairman of the EEOC described the agency as "one of the few federal agencies oriented toward its consumer group rather than toward those whom it regulates" and stated that "[t]he agency essentially has been reacting to the public rather than doing what Congress intended it to do." [26]

During the debates on Title VII, concern was expressed about whether the EEOC would or would not be impartial. Representative Bella Abzug stated: "[W]e have to have a partiality in our [Equal Employment Opportunity] [C]ommission which understands that it has to fulfill the needs of the blacks and the minorities and the women in this country for equal employment." 117 Cong.Rec. 32,096 (1971). In 1972, Congress ratified partiality.

Consistently, the agency has had a philosophy, a way of looking at the society, which allows it to single out and proceed against almost any employer. A former Chairman summed it up: " 'It is very difficult for a company that did not start hiring yesterday, literally yesterday, not to be in violation.' " Reinhold, *U.S. to Monitor Hiring Practices of Big Concerns*, N.Y. Times, Jan. 5, 1978, at 1, col. 6 (statement by Eleanor Holmes Norton).

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[26] London, *A Conversation with Eleanor Holmes Norton*, 3 Employee Rel.L.J. 313, 316, 319 (1978).

The EEOC's advocacy role was the precise reason that the Minority Report prevailed and Congress did not grant the agency National Labor Relations Board (NLRB)-like powers.

> We contend that the EEOC has attained an image as an advocate of civil rights, and properly so. For this very reason, we submit that it cannot be an impartial arbiter of the law. An advocate, by nature, represents one side of an issue. How can he then be asked to apply the law without prejudice?

H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 59 (1971) (Minority Report).[27]

The agency's role as a "zealous proponent" has understandably led it to excess,[28] and often attorneys' fees have been awarded against it under the standard articulated in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978) (fee awards may be made when a "claim was frivolous, unreasonable, or groundless, or . . .

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[27] References in the House to the "strong advocate role [the] EEOC has played in the past," 117 Cong.Rec. 31,970 (1971) (remarks of Rep. Perkins), were echoed in the Senate.

To Senator Tower, "Instead of acting as an impartial mediator, the Commission has in many instances been an antagonist." 118 Cong.Rec. 595 (1972). To Senator Fannin, "The Equal Employment Opportunity Commission [was] a zealous proponent of the employee." 118 Cong.Rec. 699 (1972).

[28] *See, e.g., EEOC v. Anchor Continental, Inc.*, 74 F.R.D. 523, 526 (D.S.C. 1977) (The EEOC "has a weak case and hopes to harass the defendant into making some type of settlement. 'Bluff and harass' are the nicest words to describe the action of the plaintiff. 'Extortion' would probably be more appropriate."); *see also EEOC v. Zia Co.*, 582 F.2d 527, 532 (10th Cir. 1978); *EEOC v. Ipco Hospital Supply Co.*, 32 Fair Empl.Prac.Cas. (BNA) 130 (S.D.N.Y. June 23, 1983); *EEOC v. Sears, Roebuck & Co.*, 504 F.Supp. 241, 249, 250 (N.D.Ill. 1980); *EEOC v. First Alabama Bank*, 440 F.Supp. 1381, 1385 (N.D.Ala. 1977), *aff'd*, 611 F.2d 132 (5th Cir. 1980); *EEOC v. J.C. Penney Co.*, 11 Empl.Prac.Dec. (CCH) ¶ 10,661, at 6799 (N.D. Ala. 1975).

the plaintiff continued to litigate after it clearly became so").[29]

B. The Independence of the Bar Is Essential

The issue before the Court is not whether law firms have a "right to discriminate" but whether Congress intended to inject an agency of the Executive Branch, a governmental advocate, into disputes with the advocates of the government's opponents.

To sue under Title VII, a private party must first file a charge with the EEOC (or have a charge filed on his behalf). 42 U.S.C. § 2000e-5. A politically selected Commissioner of the EEOC also may file a charge. *Id.* §§ 2000e-4(a), 2000e-5(b). Once the charge is filed, the EEOC must investigate,[30] determine reasonable cause, and attempt voluntary compliance before initiating a lawsuit. *Id.* §§ 2000e-5(b), 2000e-5(f)(1). Subpoenas may be issued, *see id.* § 2000e-9 (citing 29 U.S.C. § 161); client files may be taken and examined, *see* 42 U.S.C. § 2000e-8(a); and clients may be called to testify about the lawyer in question. *See id.* § 2000e-9 (citing 29 U.S.C. § 161).

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[29] *See, e.g., EEOC v. Pierce Packing Co.*, 669 F.2d 605, 609 (9th Cir. 1982); *EEOC v. First Alabama Bank*, 595 F.2d 1050, 1056 (5th Cir. 1979); *EEOC v. Shoney's, Inc.*, 542 F.Supp. 332, 334 (N.D.Ala. 1982); *EEOC v. Union Camp Corp.*, 536 F.Supp. 64, 65 (W.D.Mich. 1982); *EEOC v. St. Louis-S.F. Ry.*, 23 Empl.Prac.Dec. (CCH) ¶ 30,969, at 15,993-94 (N.D.Okla. 1980), *appeal dismissed*, 651 F.2d 719 (10th Cir. 1981); *EEOC v. Datapoint Corp.*, 457 F.Supp. 67-68 (W.D.Tex. 1978). Attorneys' fees also were awarded prior to *Christiansburg*. *See, e.g., Black Musicians v. Local 60-471, American Federation of Musicians*, 442 F. Supp. 855, 859 (W.D.Pa. 1977); *EEOC v. Howard Johnson Co.*, 16 Empl. Prac.Dec. (CCH) ¶ 8126, at 4591 (S.D.Ala. 1977); *EEOC v. Bendix Corp.*, 435 F.Supp. 76, 78 (M.D.Fla. 1977); *EEOC v. New Enterprise Stone & Lime Co.*, 74 F.R.D. 628, 633 (W.D.Pa. 1977).

[30] The scope of the EEOC investigation is not restricted to the allegations in the charge but may be expanded to inquire into matters growing out of a reasonable investigation of that charge. *See, e.g., EEOC v. Bailey Co.*, 563 F.2d 439, 446 (6th Cir. 1977), *cert. denied*, 435 U.S. 915 (1978).

Lawyers, independent of government, are essential to a system of checks and balances carefully designed to provide "a bulwark against tyranny." *United States v. Brown*, 381 U.S. 437, 443 (1965); *cf. INS v. Chadha*, 51 U.S.L.W. 4907, 4916 (U.S. June 23, 1983) ("The Constitution sought to divide the delegated powers of the new federal government . . . to assure . . . that each Branch of government would confine itself to its assigned responsibility."). This Court in *Ex parte Garland*, 71 U.S. (4 Wall.) 366 (1867), struck down a legislative effort to exclude certain attorneys from practice in the federal courts. Similarly, in *First Bank & Trust Co. v. Zagoria*, 250 Ga. 844, 845-46, 302 S.E.2d 674, 675 (1983), the Supreme Court of Georgia held that the legislature "cannot constitutionally cross the gulf separating the branches of government by imposing regulations upon the practice of law."[31]

The Congress that considered the Civil Rights Act of 1964 simultaneously considered the Criminal Justice Act of 1964. 18 U.S.C. § 3006A. On January 15, 1964, five months prior to the enactment of Title VII, Representative McCulloch spoke of the "clear and present danger that would exist to our basic liberties if a federal public

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[31] *Zagoria* concerned the personal liability of a lawyer-shareholder, Stoner, in a professional corporation for the misdeeds of a fellow lawyer-shareholder. Stoner was not personally involved in his colleague's misconduct. The Supreme Court of Georgia saw a "call[] for the exercise of [its] authority to regulate the practice of law" and held the attorney who was not personally involved to be nevertheless responsible. *First Bank & Trust Co. v. Zagoria*, 250 Ga. at 845, 302 S.E.2d at 675. The court explained that:

> A lawyer's relationship to his client is a very special one. *So also is the relationship between a lawyer and the other members of his or her firm a special one.* When a client engages the services of a lawyer the client has the right to expect the fidelity of other members of the firm. It is inappropriate for the lawyer to be able to play hide-and-seek in the shadows and folds of the corporate veil and thus escape the responsibilities of professionalism.

Id. at 846, 302 S.E.2d at 675 (emphasis added).

defender system was established." 110 Cong.Rec. 455 (1964). The problem he (and ultimately both Houses of Congress) foresaw was that a federal public defender service would adversely affect the independence of the bar. He quoted approvingly an address by Justice Brennan:

> The plain fact is that an independent bar is just as essential to the preservation of freedom as is an independent judiciary, or the bill of rights in our Federal and State constitutions. The bar is the creation of a democratic people to intervene as champion between the individual and his Government.

Id. (quoting Statement by the Honorable William J. Brennan, printed in Legal Aid Brief Case at 76-77 (Nov. 1, 1956)); [32] *see Ferri v. Ackerman*, 444 U.S. 193, 199 n.15, 204 (1979); *see also* Burger, *The Role of the Law School in the Teaching of Legal Ethics and Professional Responsibility*, 29 Clev.St.L.Rev. 377, 378 (1980) ("An independent judiciary alone is not enough; it must be supported by a strong, independent, courageous and competent bar. This is an imperative for a free people.").

As Justice Jackson noted, "[I]t too often is overlooked that the lawyer and the law office are indispensable parts of our administration of justice. . . . The welfare and tone of the legal profession is therefore of prime consequence to society," *Hickman v. Taylor*, 329 U.S. 495, 514-15 (1947) (Jackson, J., concurring), and like admissions to the bar and disciplinary proceedings, is within the province of the Judicial Branch.[33] For the existence

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[32] Justice Brennan continued:

> Too often in history the citizens of other countries possessing constitutions and bills of rights similar to our own lost their liberties because they did not possess a bar with sufficient courage and independence to establish those rights by a brave assertion of the legal processes developed for their vindication.

110 Cong.Rec. 455 (1964) (citation omitted).

[33] *See, e.g., District of Columbia Court of Appeals v. Feldman*, 51 U.S.L.W. 4285, 4290 (U.S. Mar. 23, 1983) (qualification for

of liberty, "[i]t is . . . important both to society and the bar itself that lawyers be unintimidated—free to think, speak, *and act* as members of an Independent Bar." *Konigsberg v. State Bar*, 353 U.S. 252, 273 (1957) (emphasis added).

III. CONFIDENTIALITY IS BOTH THE STRENGTH AND VULNERABILITY OF LAWYERS

In construing the permissible reach of a particular statute, this Court evaluates the practical effects of its decision. Any other approach would engender disrespect for the law. Extension of Title VII to the law firm partnership decision (1) necessarily would intrude on lawyer-client confidentiality, which in turn would force law firms into settlement of even groundless claims of discrimination and (2) would pose insurmountable remedial problems.

A. Intrusion into Lawyer-Client Confidentiality

"The most positive criteria for associate advancement are the ability to get along with the firm's clients, excellence in work product, compatibility with others in the office, and creativity in handling legal matters." Altman, *15 Steps to Partnership*, Barrister, Spring 1983, at 4, 62 (15 Steps to Partnership). For example, in this case, affidavits state that the partnership decision was influenced by Petitioner's "difficulties in dealing with other attorneys and with clients." J.A. 47, 52.

When a law partnership bases its denial of partnership on an associate's inadequate work for clients, the inquiry has to intrude upon the confidentiality of the attorney-client relationship. "It is not only the conclusions that may be reached . . . which may impinge on rights guaranteed . . . but the very process of inquiry leading to

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admission); *Middlesex County Ethics Comm. v. Garden State Bar Association*, 457 U.S. 423, 433 (1982) (disciplinary proceeding).

findings and conclusions." *NLRB v. Catholic Bishop*, 440 U.S. 490, 502 (1979).[34]

Among the interrogatories Petitioner directed at King & Spalding was the following:

> If you contend that defendant's decision . . . was based on . . . deficiencies in plaintiff's performance of her professional duties and responsibilities in representing . . . clients . . . , please identify each such matter by stating:
>
> (1) the name of the client;
>
> (2) the name of the matter;
>
> (3) the file or other identifying number of the matter; and
>
> (4) describe the specific . . . difficulty in plaintiff's performance; and
>
> (5) identify (A) the persons who[] . . . have personal knowledge of the facts . . . in connection with a specific matter or client, and (B) the documents that defendant contends . . . reflect . . . any . . . deficiency in plaintiff's performance.

J.A. at 99-100.[35]

This interrogatory provides a clear example of why a law partnership, when deciding whether to defend itself, faces a "'grisly,' hard, Hobson's choice." *Whitus v. Balkcom*, 333 F.2d 496, 499 (5th Cir.), *cert. denied*, 379 U.S. 931 (1964).[36] If law partners defend on the merits

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[34] *NAACP v. Button*, 371 U.S. at 433 ("The threat of sanctions may deter . . . almost as potently as the actual application of sanctions.").

[35] Answers were deferred until after a decision on the jurisdictional issue. *See* J.A. 124.

[36] Petitioner and the EEOC understand this. On March 31, 1980, Petitioner's counsel wrote the district court proposing, among other things, "the entry of an appropriate protective order protecting the confidentiality of information disclosed by discovery." J.A. 80-81. Petitioner's counsel continued:

and challenge a plaintiff's performance for clients, partners will be forced to answer questions about their clients and, inevitably, about the substance of their representation, thereby violating their duties as lawyers.[37] Their alternative is to buy their way out or not raise the defense and lose.

As one commentator has noted:

> The issue of confidentiality of client records and communications has not yet arisen in any reported cases. However, it will almost certainly arise when cases involving discharge or failure to promote go to trial. The courts have only begun to grapple with some of these issues in the discovery cases. Discrimination is rarely proved directly. . . .

Bardeen, *The Legal Profession: A New Target for Title VII*, Cal.St.B.J., Sept. 1980, at 360, 362.[38]

Another commentator saw a potential conflict of interest "when a company attorney finds himself or herself the victim of discrimination, and wishes to use information obtained as an attorney to end such practices." Olmsted, *Law as a Business: The Impact of Title VII on the Legal "Industry,"* 10 Val.U.L.Rev. 479, 483 (1976). The author notes that it would "seem almost impossible for an

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> [W]e recognize that discovery . . . is likely to involve some of the most private and sensitive decisions that a law firm makes . . . .
>
> I don't want to be forced to explore these sensitive issues by discovery unless it becomes necessary . . . nor do I want King & Spalding to feel that discovery into their private affairs is being used as any kind of lever to coerce the firm to settle a claim which it believes to be without merit.

J.A. 81; *see* J.A. 149-50, 252-53 (EEOC requests for confidential information regarding King & Spalding's internal structure).

[37] *See* Model Code of Professional Responsibility DR 4-101 (1980); *id.* EC 4-1.

[38] "A Court may, of course, issue protective orders . . . . That power might well be ineffective in these cases . . . ." Note, *Applicability of Federal Antidiscrimination Legislation to the Selection of a Law Partner*, 76 Mich.L.Rev. 282, 303 n.123 (1977).

attorney-employee of a corporation to separate many facts learned [during the course of employment] . . . . Such an employee never stops being an attorney." *Id.* at 496.[39]

Already associates have "powerful leverage" [40] to pressure law firms into "settlement of essentially groundless claims of discrimination." Note, *Applicability of Federal Antidiscrimination Legislation to the Selection of a Law Partner*, 76 Mich.L.Rev. 282, 303 n.123 (1977). One of the first cases [41] challenging a law firm's decision-making process was settled after Columbia University's EEOC-funded employment law project "began to question them about their partners' earnings *and other matters firms are loathe to make public.*" C. Epstein, Women in Law 186 (1983) (emphasis added) (Women in Law). Additionally, "the mere filing of a civil action . . . may cause damage to . . . good names and reputation and may also result in economic harm." *Southern Methodist University Association of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707, 713 (5th Cir. 1979).

Petitioner wrote to the district court of a desire not to "want King & Spalding to feel that discovery into their private affairs is being used as any kind of a lever to coerce the firm to settle a claim that it believes to be without merit." J.A. 81. Petitioner also professed a desire "to avoid . . . public embarrassment." J.A. 84. Petitioner's reference to the "Dred Scott case of the legal

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[39] *See Hull v. Celanese Corp.*, 513 F.2d 568, 572 (2d Cir. 1975).

[40] [I]n some instances a more attractive alternative than actually starting legal proceedings may simply be to communicate to the employer a knowledge of one's legal rights and the willingness, if necessary, to resort to legal proceedings. Such communication may itself provide powerful leverage in negotiating for fair employment . . . for the annoyance and possible public embarrassment . . . provide an incentive to behave fairly.

Comment, *Self Defense for Women Lawyers: Enforcement of Employment Rights*, 4 U.Mich.J.L.Ref. 517, 544 (1971).

[41] *Blank v. Sullivan & Cromwell*, 418 F.Supp. 1 (S.D.N.Y. 1975).

profession" [42] is mere advocacy; [43] however, it does call for a response.

Long before Petitioner was born, King & Spalding partners were advocating respect for the rights of individuals.[44] Later, when the forces of racial segregation threatened to obstruct this Court's orders, King & Spalding partners stepped forward to urge respect for the rule of law [45] and this Court's commands.[46]

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[42] Petition for a Writ of Certiorari at 29.

[43] *See also* Petitioner's Brief at 23 ("Can . . . [a] law firm . . . post a sign on the door of its partnership meetings that reads . . . NO WOMEN, NO BLACKS, NO JEWS ADMITTED").

King & Spalding has two female partners and three Jewish partners. While there are no black partners at present, a black senior associate recently accepted appointment as United States Attorney for the Northern District of Georgia.

[44] *See, e.g.*, Address of Jack J. Spalding at 3, 5, 7, 116th Anniversary of the Hibernian Society of Savannah, Georgia (Mar. 17, 1928) (condemning: "lynching"; "flogging"; "a masked unit of ten men"; and "[t]he lynching of Frank [which] like John Brown's spirit, still 'goes marching on' "; a Senator telling a fellow Senator that if he came "to his state . . . and . . . advocate[d] freedom of conscience in religious matters, that he would be tarred and feathered"; and "You and I . . . [who] fail to discharge our duty . . . . We have become materialized and commercialized, selfish, greedy and money making and have lost our patriotism.").

[45] In 1960, John A. Sibley, a former partner in the firm, was asked by Griffin B. Bell to head a state commission that held hearings regarding school desegregation. "[He] tried to make it clear at the hearings, so the people wouldn't delude itself, that under the law they could not continue with their segregated public schools." Hopkins, *A Georgia Patriarch*, Atlanta J. & Const., Aug. 6, 1977, A1, col. 1, at A4, col. 3.

[46] *Rights Advocate Troutman Dies*, Atlanta J., Mar. 16, 1973, at A4, col. 1:

> Robert B. Troutman Sr., one of Georgia's most prominent attorneys and one of the early advocates of voluntary desegregation, died Thursday. . . .
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> . . . .

[Footnote continued on page 29]

B. The Insurmountable Remedial Problems

Petitioner tells this Court not to concern itself with the consequences of its decision. The Government also is unconcerned. "This case involves no questions of relief," the EEOC writes. EEOC Brief at 12 n.4.

The court of appeals, however, was so concerned that, following oral argument, Petitioner's counsel felt it necessary to write to that court.

> The questions of remedy seemed to be troubling members of the Court during the oral argument. It should be noted at the outset that appellant is now a partner in another Atlanta law firm; [47] appellant

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[46] [Continued]

> He was honored by Pope Paul VI and by the National Conference of Christians and Jews.
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> . . . .
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> In the 1950[s] Troutman was one of the lawyers who tried to help Georgians adapt to the 1954 U.S. Supreme Court decision ending the "separate but equal" school systems. . . .
>
> . . . .
>
> Troutman urged fellow lawyers to seek a peaceful solution to the racial question, and asked them to "make the machinery of justice work." He added, "It is your supreme duty to see that every individual citizen, regardless of race or creed, shall receive justice under the law."

[47] In the two and one-half years since Petitioner left King & Spalding, she has been a member of not one but two law firms. According to II Martindale-Hubbell Law Directory 820, 3301B (1981), Petitioner was an associate with Haas, Holland, Lipshutz, Levison & Gibert. By 1982, she was a partner in that firm. II Martindale-Hubbell Law Directory 849, 3609B (1982). By 1983, she had become a member of another Atlanta law firm, O'Callaghan, Saunders & Stumm. II Martindale-Hubbell Law Directory 537, 1621B (1983).

> Not too long ago, the idea that a group of partners from a major law firm would pick up and move to another firm was all but unthinkable. But these days, such defections are fast and furious . . . .
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> . . . .

[Footnote continued on page 30]

> did not in the lower court and is *not* now seeking the remedies of reinstatement and admission to partnership.

Letter from Emmet J. Bondurant, II, to Hons. Gerald B. Tjoflat, Peter J. Fay, and George C. Young at 9 (Jan. 25, 1982) (emphasis in original).

In this Court, only the ACLU forthrightly suggests that "[w]here a *post-promotion* act of discrimination against a partner is a pretext to avoid the command of Title VII, courts possess ample authority to look through such a shabby ploy and enforce the act." ACLU Brief at 27 (emphasis added).

If Petitioner and the EEOC have their way, courts will be asked to order the admission of unwanted persons into law partnerships. Thereafter, collegially made decisions will be vulnerable to charges of discrimination.[46] Partners will have to concern themselves with the "leverage" provided another partner by a court order. There may be allegations of disparate treatment arising from the assignment of cases or the assignment of associates to a particular partner. The EEOC and courts may be called upon to answer questions regarding the "case loads" of partners and whether "overwork" was the result of "post-

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[47] [Continued]

> Switching firms is similar to divorce . . . .

Lewin, *Business and the Law: Hiring Away Legal Talent*, N.Y. Times, July 12, 1983, at D2, col. 1-3.

> [Such] a thing had been unheard of a decade before—gentlemen didn't raid each other's firms. Once raiding was legitimized for municipal bonds, . . . it spread to other areas of the law.

P. Hoffman, Lions of the Eighties 32 (1982).

[48] Of a hypothetical twenty equally brilliant law school graduates in a law office, one is selected to become a partner. Extensive discovery would reveal that the other nineteen were almost equally well qualified. . . . And, of course, even judges are plagued by the difficulty of decision in selecting law clerks out of the many equally well qualified.

Faro v. New York University, 502 F.2d 1229, 1232 (2d Cir. 1974).

promotion" discrimination. Questions may arise regarding whether the unwanted partner is receiving equal "pay" for equal work, equal "pay" for work of comparable value, and just what is "equal," "substantially equal," "similar," or "comparable" when comparing different kinds of legal work, partners' hours, skills, seniority, and the ability to attract and hold clients. Partners review requests of clients for the assignment of particular partners to their work and decide who is to be in charge of a particular client. These requests and decisions may be subject to EEOC review and litigation, for they may fall within the agency's definition of forbidden "customer preference."

The public cannot possibly be well-served by lawyers forced to practice together after rejection by a review of partner-peers, and law partners should not be required to entrust their client's cause to a partner whom they rejected.

IV. STATISTICS AND STEREOTYPES

A. The Legal Profession and Women: Statistical Information

In 1981, there were 581,000 lawyers and judges—more than twice the number only eleven years earlier.[49] By the year 2000, it is estimated that there may be one million lawyers and that the size of the judiciary may double. Janofsky, *The Future of the Legal Profession and the Role of the American Bar Association*, 11 U.Tol.L.Rev. 201, 202, 204 (1980).

Despite the tremendous growth in the number of lawyers, "the overall pattern of distribution of lawyers among private practice, government employment, employment in business or industry, and in [other] miscellane-

[49] *See* U.S. Bureau of the Census, Statistical Abstract of the United States: 1982-83, at 388, Table 651 (103rd ed. 1982) (number of lawyers and judges in 1981); U.S. Bureau of the Census, Historical Statistics of the United States: Colonial Times to 1970, Part 1, at 140, Table 233-682 (1975) (number of lawyers and judges from 1900 to 1979).

ous categories . . . has not altered significantly in the last 10 years." Curran, *Lawyer Demographics* 14 (1982) (paper presented by the Associate Executive Director of the American Bar Foundation at ABA 1982 Annual Meeting) (preliminary analysis of computerized information provided by Martindale-Hubbell to American Bar Foundation) (Lawyer Demographics). Approximately 70% of all lawyers are in private practice. Almost half of these lawyers are solo practitioners, and another one-third practice with law firms which have fewer than 10 lawyers. *Id.* at 9. Of all law firms, 92% have fewer than 10 attorneys. *Id.* at 11. Only "[a]bout five percent of the nation's law graduates end up at the big firms." Women in Law at 176.

"Between 1910 and 1970, women represented less than 4% of this nation's lawyers . . . ." AAUW Brief at 8 (citation omitted).[50] "Since 1970, the percentage of women in the law has increased dramatically." Massachusetts Women's Brief at 5 (citation omitted).[51] "Over the nine-year period from 1972 through 1981, the number of women employed . . . as lawyers and judges increased

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[50] Actually, females comprised less than 3% of the nation's attorneys between 1948 and 1970. *See* American Bar Foundation, The 1971 Lawyer Statistical Report 5, Table 1 (1972) (number and percentage of lawyers by sex).

[51] According to the *National Law Journal*, Cynthia Fuchs Epstein, the author of *Women in Law*, cites the competition for legal talent among firms as one of the causes of the rise in the number of women lawyers. Flaherty, *Women & Minorities: The Gains*, Nat'l L.J., Dec. 20, 1982, 1, col. 1, at 9, col. 3. Starting salaries at major law firms reflect the intensity of the competition. *See* Flaherty, *N.Y. Firms Hold Line on Associate Salaries*, Nat'l L.J., Sept. 27, 1982, at 2, col. 3 (major firms to "hold the line" on salaries for first-year associates at $43,000). Epstein writes of the "courting process" to recruit female and male talent from Ivy League law schools and of the Wall Street law firms that provide them "first-class hotel suites, gourmet dinners, and tickets to Yankee Stadium and symphony concerts." Women in Law at 176. "[I]n reality the whole system is part of the recruitment mechanism." E. Smigel, The Wall Street Lawyer 68 (1969).

more than three-fold from 3.8% . . . to 14.1%." Petitioner's Brief at 22 (citation omitted).

The rise in the number of female lawyers has been reflected in law firms, especially the large ones. In 1970, 1.3% of law firm partners and 2.7% of the associates were women. *See* American Bar Foundation, Women Lawyers: Supplementary Data to the 1971 Lawyer Statistical Report 8, Table 6 (1973). By 1982, according to the *National Law Journal* survey of 151 of the nation's 200 largest firms, 17% of the lawyers at big firms—3.2% of the partners and 28% of the associates—were women. Flaherty, *Women & Minorities: The Gains*, Nat'l L.J., Dec. 20, 1982, 1, col. 1, at 8, col. 1 (figures compiled from table reporting survey results) (Nat'l L.J. 1982 Survey).[52] In fact, the overall percentage of women in large law firms exceeds the overall percentage of female attorneys. *Compare id.* at 1, col. 2 (17% women at big firms), *with id.* at 9, col. 1 (14% women lawyers).

During the last four terms of the Supreme Court, approximately 17% of its law clerks were women. In

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[52] In recent years, the increase in the percentage of women at big firms—at both the associate and partnership level—has far out-stripped the overall rate of growth at these firms. From 1980 to 1981, as the number of associates at the 50 largest firms increased by aproximately 10% (5820 to 6408), the number of female associates increased by almost 24% (1242 to 1537). Burke & Johnson, *More Women on the Way Up*, Nat'l L.J., Apr. 20, 1981, at 1, col. 1 (survey of 50 largest law firms) (figures compiled from reported data). During this same period, the total number of partners at these firms increased by 11.5% (3832 to 4271) while the number of female partners increased by 39% (87 to 121). *Id.* Similarly, from 1981 to 1982, as the number of associates at the big firms increased by approximately 9% (11,019 to 12,030), the number of female associates increased by 21% (2766 to 3351). Nat'l L.J. 1982 Survey at 8, col. 1 (figures compiled from table reporting survey results). And while the total number of partners at these firms rose by 7.3% (8586 to 9210) from 1981 to 1982, the number of female partners increased by 40% (212 to 297). *Id.*

1979-80, 6 of 32,[53] or 19%, were women; in 1980-81, 3 of 32,[54] or 9%, were women; in 1981-82, 7 of 32,[55] or 22%, were women; and in 1982-83, 6 of 34,[56] or 18%, were women.

Women accounted for approximately 50% of the increase in the number of associates at large law firms in both 1981[57] and 1982.[58] "[T]he low partnership percentage is likely to rise as the[] [female] associates gain seniority." Nat'l L.J. 1982 Survey at 9, col. 3.

"Law school figures reflect that this trend towards increasing numbers of women in the law will continue." Massachusetts Women's Brief at 6. While "[i]n 1964, there were fewer than 2,200 women (4%) enrolled in accredited law schools[,] . . . [b]y 1981, the number of women studying law had grown to 44,986 or 35% of the total law school enrollments." Petitioner's Brief at 20 (citations omitted). The growth during the last decade has been particularly striking.[59]

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[53] Marcus, *Few Women to Clerk at High Court*, Nat'l L.J., Aug. 4, 1980, at 3, col. 1; Marcus, *High Court Roster*, Nat'l L.J., Sept. 24, 1979, at 6, col. 1.

[54] Marcus, *Few Women to Clerk at High Court*, Nat'l L.J., Aug. 4, 1980, at 3, col. 1.

[55] Carelli, *No Justice for 3 Supreme Court Clerks*, Nat'l L.J., Aug. 10, 1981, at 3, col. 2 (figures reflect ratio prior to Justice Potter Stewart's retirement).

[56] Carelli, *New Clerks at Court: A Roster*, Nat'l L.J., July 19, 1982, at 3, col. 1.

[57] *See* Burke & Johnson, *More Women on the Way Up*, Nat'l L.J. Apr. 20, 1981, 1, col. 1, at 11 (chart) (295, or 50.2%, of 588 new associates at 50 largest firms were women) (figures compiled from reported data).

[58] *See* Nat'l L.J. 1982 Survey at 8 (585, or 57.9%, of the 1011 new associates at 151 of 200 largest firms were women) (figures compiled from table reporting survey results).

[59] *See* ABA, Section of Legal Education and Admissions to the Bar, *A Review of Legal Education in the United States—1981-82*, at 54 (1982) (enrollment in ABA-approved schools by year and sex).

The number of black and other minority group lawyers, although still low, also has increased. Between 1972 and 1981, the percentage of black and other non-white lawyers and judges grew from 1.9% to 4.6%. *See* U.S. Bureau of the Census, Statistical Abstract of the United States: 1982-83, at 388, Table 651 (103rd ed. 1982). This increase was paralleled by a rise in the percentage of black and other minority law students.[60] Although minority law school graduates are less likely than their non-minority counterparts to enter private practice[61] and a number of large firms have no black or Hispanic attorneys,[62] the percentage of blacks at large law firms mirrors their percentage among all lawyers.[63] "The profit motive

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[60] *See* ABA, Section of Legal Education and Admissions to the Bar, *A Review of Legal Education in the United States—1981-82*, at 50-51 (1982) (black and total minority group students enrolled in approved law schools); *id.* at 53 (total enrollment in approved law schools) (percentages derived from reported data):

Year	% Black	% Total Minority
1969	3.1	4.3
1974	4.5	7.5
1978	4.4	8.2
1981	4.5	8.7

[61] According to the National Association for Law Placement report, 32% of the employed 1980 minority law school graduates were in private practice in 1981 compared to 54% of all employed 1980 law school graduates. *See* National Association for Law Placement, Class of 1980 Employment Report and Salary Survey at 4, Table A (1981). Minorities were approximately twice as likely as the average 1980 law school graduate to enter government service. *Id.* (26.6% to 13.7%).

[62] *See* Nat'l L.J. 1982 Survey at 1, col. 1.

[63] *Compare* Nat'l L.J. 1982 Survey at 1, col. 1 ("black attorneys now constitute 2.9 percent of the lawyers" at big firms) *with id.* at 9, col. 1 ("blacks accounted for 2.7 percent" of all lawyers in 1980). "[O]nly Hispanic lawyers seem disproportionately scarce in the big firms." *Id.* at 1, col. 1.

may also explain the rise in the number of black lawyers at the big firms, suggests Mr. [William T.] Coleman. 'There are a lot of good business reasons to hire minority lawyers' he said. . . .[64] 'My experience,' says Mr. Coleman, 'is that every firm is now actively seeking minority lawyers who measure up to its standards.'" Nat'l L.J. 1982 Survey at 9, col. 3.[65]

B. Petitioner's Case Rests on Inaccurate Stereotypes

Petitioner assumes that men as a class discriminate against women as a class. This assumption is not borne out by opinion surveys. Men have outpaced women in support for the Equal Rights Amendment[66] and for efforts to strengthen the status of women.[67] The concepts of equal pay for equal work,[68] of married women working

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[64] As Mr. Coleman explained, "'Now, there are minority mayors, minority water commissioners, and so forth. There are minorities in key positions in corporations. It can be helpful for a firm to have minority lawyers.'" Nat'l L.J. 1982 Survey at 9, col. 4 (quoting William T. Coleman).

[65] *Cf.* ADL Brief at 8 (decline in religious discrimination at law firms against Jews and Catholics).

[66] In 1975, 68% of men and 55% of women favored the Equal Rights Amendment. In 1980, the percentage of men and women favoring the amendment was 52 and 51 respectively. Roper Organization, Inc., The 1980 Virginia Slims American Women's Opinion Poll at 90 (1980).

[67] Men led women in support of efforts to strengthen the status of women by 44% versus 40% in 1970, 49% versus 48% in 1972, and 63% versus 57% in 1974. Louis Harris and Associates, The Virginia Slims American Women's Opinion Poll at 4-5 (1970); Louis Harris and Associates, The 1972 Virginia Slims American Women's Opinion Poll at 2-3 (1972); Roper Organization, Inc., The Virginia Slims American Women's Opinion Poll, Vol. III, at 2-3 (1974).

[68] In 1973 and 1977, nine out of ten men and women alike supported equal pay for equal work. Public Opinion, Jan./Feb. 1979, at 36.

full-time[69] and of a female president[70] have received equal acceptance among men and women.

In 1978, 41% of women interviewed perceived that there was a great deal or a fair amount of discrimination against women as a group. When asked if they personally had been discriminated against, however, only 16% of these women responded affirmatively.[71] In another survey conducted in 1977, only 12% of women employed 20 hours or more a week said they personally had experienced discrimination on the job because of their sex.[72]

Petitioner's assumption that male lawyers as a class desire to discriminate against female lawyers ignores the fact that male law partners of today have almost as many lawyer-daughters as lawyer-sons.[73] Associates must be recruited from law schools that do not allow law firms which discriminate to recruit there.[74] Most students philosophically reject discrimination and will reject law firms that practice it.

The EEOC implicitly concedes that a law firm is under economic pressure not to discriminate in partnership

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[69] In 1977, three out of four men and women alike approved of married women working full-time outside the home. The Roper Organization, Inc., Roper Reports 79-1, at N100-104 (Feb. 1979).

[70] By 1978, eight out of ten men and women alike were ready to elect a woman president. Public Opinion, Jan./Feb. 1979, at 36.

[71] The Roper Organization, Inc., Roper Reports 78-3, at 68, 72 (Apr. 1978).

[72] Quinn & Staines, *The 1977 Quality of Employment Survey* 37 (1978) (Table 3.1) (Institute for Social Research, The University of Michigan).

[73] *Cf.* Nat'l L.J. 1982 Survey at 9, col. 4 (quoting California Court of Appeal Justice Joan Dempsey Klein) (" 'There are lots of senior partners out there who have daughters who are graduating from law school. They have to make room for them.' ").

[74] *See* ABA Standards for the Approval of Law Schools, Standard 211 (1973), *reprinted in* ABA, Approval of Law Schools 6-7 (1979).

selection when it states, "It is not difficult to predict, however, that a firm that wholly divorced its partnership selection process from its relationship with its associates would have enormous difficulty in attracting associates to join it." EEOC Brief at 19 n.8. Petitioner evidently believes that male lawyers have an abiding desire to discriminate against their own economic interests or do not understand what their interests are.

V. THE NEED TO HALT THE TREND TO COMMERCIALIZATION AND BUREAUCRATIZATION

Recently, the former Dean of the Harvard Law School, Derek C. Bok, in a reasoned and provocative criticism of the legal system echoed the Chief Justice's remarks about "a new trend that was not intended." [75] Bok noted that judges sometimes "reach results that affect . . . people in unexpected and undesirable ways." [76]

In *Goldfarb v. Virginia State Bar*, 421 U.S. at 788 n.17, and *Bates v. State Bar*, 433 U.S. at 383-84, this Court emphasized the limited nature of its rulings, but to many these two decisions stamped a seal of approval on the view that law is just another business and law firms are, or ought to be, just like commercial and governmental bureaucracies. King & Spalding rejects that view.

The "notion that top-notch lawyers are professionals, and thus immune from concerns of the marketplace has

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[75] [C]hanges in our society often go virtually unnoticed until they have become a fixed part of the structure and changes in the law exhibit this same characteristic. . . . Changes in the law come silently and, like a glacier, the movement is almost imperceptible . . . .

Fortunately for all of us, scholars . . . may discern a new trend or a new concept—and it is sometimes a new trend that was not intended.

Burger, *Today's "Bizarre" Cases May Contain the Legal Seeds for Future Change*, L.A. Daily J., July 17, 1980, at 4, col. 3.

[76] D. Bok, Harvard University, The President's Report 1981-82 (Report to the Board of Overseers of Harvard University) at 10 (1983).

been replaced by a hustling for clients more familiar in the advertising and insurance business." Lewin, *A Gentlemanly Profession Enters a Tough New Era*, N.Y. Times, Jan. 16, 1983, § 3, at 1, col. 1.[77] "Although none of the top firms has yet . . . run commercials on *60 Minutes*, many other selling tools are gaining acceptance." *The Blue-Chip Lawyers Discover Marketing*, Bus. Week, Apr. 25, 1983, at 89. According to a survey conducted by the *Legal Times*, common marketing strategies among larger firms include the use of public relations firms, the formation of business development committees, the publication of brochures and newsletters, and the conducting of seminars for clients. Graham, *Era of Client Development Has Arrived*, Legal Times, Apr. 18, 1983, 1, col. 1, at 2, col. 2-4 (chart).[78]

The legal profession's internal publications document intensive preoccupation with the commercial aspects of practice. In July 1978, for example, the ABA Journal ran feature articles entitled *Legal Services for the Average Citizen*, *Revising the Criminal Justice Standards*, and *Taking the Rule of Law to Prisons*, as well as a series of articles commemorating the ABA's centenary. 64 A.B.A.J. *passim* (1978). Five years later in July 1983, the Journal's features included *The Right Way to Advertise on TV*, *Choosing Video Equipment for the Law Office*, and *Saving Space and Money with Records Management*. 69 A.B.A.J. *passim* (1983). Articles on law as a business abound.[79]

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[77] *But cf. Bates v. State Bar*, 433 U.S. at 372 n.25 ("Economic considerations suggest that advertising is a more significant force in the marketing of inexpensive and frequently used goods and services with mass markets than in the marketing of unique products or services.").

[78] *See also* Taylor, *Law Firms Squirm, Then Turn to Public Relations*, N.Y. Times, July 27, 1983, at K3, col. 3 ("Active self-promotion by corporate law firms . . . has rapidly become part of the Washington legal scene . . . .").

[79] *See, e.g.*, Israel, *Systems in Law Practice: Planning for Quality and Efficiency*, 26 Wayne L.Rev. 1159, 1164-65 (1980) ("Thrust

"The trends of urbanization and specialization long since have moved the typical practice of law from its small-town setting" [80] and, for years, lawyers have found "themselves strained by the conflicts in professional values vs. the organizational . . . business values." [81] Despite this,

> changes . . . during the past several years have been dramatic—and the pace of change is accelerating. The growth of large, interstate law firms, legal clinics, and prepaid legal services plans; the proliferation of lawyer advertising; and the utilization of technological innovations, such as computerized research, have had a significant impact on the traditional practice of law.

Harrell, *President's Page: Preserving Professionalism*, 69 A.B.A.J. 864 (1983) (Preserving Professionalism).[82]

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into the world of commerce and competition, advertising and marketing, business and management, under the scrutiny of knowledgeable consumers of legal services, lawyers are concluding that the time has arrived to transcend the 'cottage industry' stage and enter the legal profession's version of the industrial revolution."); Cantor, *Managing Legal Organizations in the 1980's*, 11 U.Tol.L. Rev. 311, 315 (1980) ("All lawyers must recognize that a professional organization should be governed by principles of business enterprise.").

[80] *Bates v. State Bar*, 433 U.S. at 374 n.30 (citation omitted).

[81] E. Smigel, The Wall Street Lawyer 307 (1969). Smigel reported that "[o]ne of the largest areas of conflict arises because some partners feel that they no longer are practicing law but are becoming businessmen." *Id.* at 302-03. They confront the difficulty of "maintain[ing] old standards of practice in the face of changing times for fear of going too far from the traditional professional roles and at the same time maintain[ing] their high standards of work." *Id.* at 307.

[82] The pace of change can be gauged from the ABA's efforts in the field of legal ethics. "The original 32 Canons of Professional Ethics were adopted by the American Bar Association in 1908." Model Code of Professional Responsibility at i (1980). Sixty-two years later, the Canons were replaced by the Code of Professional Responsibility. *Id.* Only 10 years later, the Code itself was deemed antiquated. *Proceedings of the Forty-First Annual Judicial*

Current observers of the profession list ten "currents of change," the most profound of which is a "*[l]oss of vision and idealism.* . . . The deprofessionalization of the profession is troubling to all who want law to be more than a business." [83]

" 'Lawyers have for centuries emphasized that the promotion of justice, rather than the earning of fees, is the goal of the profession.' " *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 460 (1978) (quoting Comment, *A Critical Analysis of Rules Against Solicitation by Lawyers*, 25 U.Chi.L.Rev. 674 (1958)). That seems less certain than it was even five years ago.

This Court's recognition that "a commercialization of the legal profession . . . might threaten the moral and ethical fabric of the administration of justice," *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 6 (1964), had best be considered for an "unexpected and undesired" trend is well underway. In the midst of it, there is an almost wistful quality to the words of the President of the ABA when he writes: "We must not permit the practice of law to become just another business." Preserving Professionalism at 864.[84]

Conference of the District of Columbia Circuit, 89 F.R.D. 169, 234 (1980) (remarks by the late Robert J. Kutak, Esq., Chairman, ABA Commission on Evaluation of Professional Standards).

[83] Glasser & Glasser, *Deep, Not Silent: Currents of Change*, Legal Times, June 13, 1983, at 2, 18 (emphasis in original). The other trends are captioned: *"Glut of lawyers nationwide . . . Pell-mell expansionism leading to the first truly national law firms . . . Astronomical growth in fees . . . Costs pressures . . . More competition for clients and new business . . . Rise of the influence of corporate counsel . . . New prominence of women in the profession . . . Changing ethnicity of law firms . . . Fascination of popular and trade press with lawyers." Id.* (emphasis in original).

[84] *Cf. Goldfarb v. Virginia State Bar*, 421 U.S. at 788 n.17 ("[i]t would be unrealistic to view the practice of professions as interchangeable with other business activities").

Just another bureaucracy would be worse. The increase in employment by governments with their civil service categories and the similar stratification of private employment through collective bargaining and personnel management have led to the bureaucratization of much of the nation's workforce.

"The bureaucrat as hero is new to America, [yet] older, conventional dreams of glory do linger on—the lawyer brilliantly turning the tables in cross examination . . . ." W. Whyte, Jr., The Organization Man 76 (1956).[85]

Those "older, conventional dreams" are fast dying.

Bureaucratization is rapidly taking hold of the legal profession.[86] Even the judiciary has not escaped it.[87]

Independence is soon to be replaced by the drive for collective security. On the authority of *Goldfarb*, the NLRB exercised jurisdiction over law firms for the first time.[88]

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[85] Historically, "[w]hat has . . . been observed most frequently is that lawyers highly value independence in their employment situations. This is reflected in dislike of supervision and of formally defined hierarchical structures." O. Maru, Research on the Legal Profession 44 (1972). The preservation of a lawyer's autonomy was central to the historic animosity to the practice of law in corporate form. Canons of Professional Ethics, Canon 35 (1928), *reprinted in* ABA, Opinions of the Comm. on Professional Ethics 156 (1967).

[86] *See, e.g.*, Brown, *Emerging Changes in the Practice of Law*, 4 Utah L.Rev. 599, 608 (1978) ("We must come to recognize that law office administration is a function worthy of the highest partnership recognition.").

[87] Kester, *The Law Clerk Explosion*, Litigation, Spring 1983, at 20.

[88] *See, e.g., Kleinberg, Kaplan, Wolff, Cohen & Burrows, P.C.*, 253 N.L.R.B. 450 (1980); *Stroock & Stroock & Lavan*, 253 N.L.R.B. 447 (1980); *Foley, Hoag & Eliot*, 229 N.L.R.B. 456 (1977). Four years before *Foley*, the NLRB explained that the "probability that a stoppage of business resulting from labor strife in . . . any . . . law firm would substantially affect commerce is not . . . sufficiently great to warrant our asserting jurisdiction over law firms." *Bodle, Fogel, Julber, Reinhardt & Rothschild*, 206 N.L.R.B. 512, 513

The NLRB now assumes that associates in law firms comprise appropriate bargaining units. *See Wayne County Neighborhood Legal Services, Inc.*, 229 N.L.R.B. 1023, 1023 (1977).

It is easy to foresee the "decline of a general professional community, a decline with potentially major implications for the lawyer-client relationship." Schwartz, *Reorganization of the Legal Profession* at 1278.[89] The "very structure of bureaucracy is a powerful force in the direction of low professional autonomy and, correspondingly, of client depersonalization." *Id.* at 1288.[90]

One answer may be the "independence" that law firms guarantee their lawyers. Because of this "autonomy,"

(1973). Its view was buttressed by "substantial countervailing practical considerations." *Id.* "A law firm, in short, is not itself engaged in the production, distribution, or sale of goods in commerce." *Id.* Prior to *Goldfarb*, the NLRB had been impressed by the fact that:

> The lawyer-client relationship is a peculiarly delicate and confidential one, and employees of lawyers must of necessity come into possession of knowledge and information of a peculiarly confidential nature. We are given pause by the arguments advanced to us in this case . . . that potential conflicts of interest are likely to develop if employees of law firms are to be represented by, and owe a substantial loyalty to, an organization which may well have interests conflicting with those of clients whom the lawyers represent.

Id. at 513-14.

[89] *Cf.* Preserving Professionalism at 864:

> It may not be possible to return to the days when the lawyer's representation was more personalized. But if we are to retain our status as a respected profession, the essential role of the lawyer as adviser, counselor, teacher, and friend must not change. To preserve this role will require vigilance and discipline.

[90] The negative aspects of bureaucratization do not stop with its impact on individual clients. Another social cost may parallel, but extend more broadly than, this impact. One of the necessary elements in the definition of a profession is a spirit of service. The separation of the bar into large aggregates of

clients receive "the best" from their attorneys. "If professional people lose this independence, then it may be predicted that the client in real need is lost, for it is the autonomy of the professional person which sets the stage for his creativity . . . ." E. Smigel, The Wall Street Lawyer 354 (1969).

VI. THE INTENTION OF CONGRESS: WHAT CONGRESS CONSIDERED AND DECIDED

A. Legislative History

A glance at the substantive sections of the statute shows that Congress considered:

1. "partnerships" and designated them an "employer," 42 U.S.C. § 2000e(a), (b);

2. "memberships" and covered them if they were in "a labor organization," *id.* § 2000e-2(c);

3. "compensation, terms, conditions, or privileges" and limited them by the words "of employment," *id.* § 2000e-2(a)(1); and

4. "employment opportunities" and limited them by the words "or otherwise adversely affect his status as an employee." *Id.* § 2000e-2(a)(2).

Faced with the language of the statute, the EEOC searched through thousands of pages of legislative history to find a scintilla of support for the congressional intention it imagines.[91] It found none. Instead, the EEOC

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producing units—the large public and private law firms—may adversely affect that spirit.

Reorganization of the Legal Profession at 1289 (footnote omitted).

[91] The New York Times pointed out that the time and words devoted to the civil rights bill was "staggering": six committees, sitting for 81 days, heard 269 witnesses; printed transcripts of those hearings cover 5791 pages, eight volumes weighing 13¼ pounds. The House filled 477 pages of the Congressional Record with debate lasting 73 hours and 41 minutes during nine days, January 31-February 10, 1964; the Senate (through June 20, 1964) filled 2890 pages with debate lasting 736 hours and 10 minutes. *History of Bill: A Year of Words*, N.Y. Times, June 20, 1964, at 10, col. 6.

found an analogy, termed it a "comparison," and called it "strong evidence that Congress intended Title VII to apply . . . to decisions comparable to a law firm's selection of partners from among its associates." EEOC Brief at 14-15 (footnote omitted).

The "strong evidence" upon which the Government relies is a single sentence which reads: "The employment needs in practically every professional and technical field are expected to rise substantially—teachers, doctors, lawyers, scientists and engineers." H.R. Rep. No. 914 (Pt. 2), 88th Cong., 1st Sess. 30 (1963) (separate views of Rep. McCulloch and others). The part of this report in which this sentence appears contains no reference to partners or partnerships, or even to women. *Id.*[92]

Leaving 1964, the EEOC flips the pages of legislative history to 1972. There it relies upon remarks of Senator Williams and Senator Javits,[93] floor managers for the comprehensive amendments to Title VII. Opposing an amendment that would have exempted the *employment* of physicians by hospitals, Senators Williams and Javits, according to the EEOC Brief, "directly confronted the

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[92] There is a reference to law firms in part 1 of the House report that is not cited in the EEOC Brief. Opponents of the bill warned that "[w]hat the courts interpret tomorrow may be altogether different from what a majority of the Members of Congress intended," H.R. Rep. No. 914, 88th Cong., 1st Sess. 112 (1963), and courts may permit the EEOC to

> assert plenary jurisdiction over . . . every restaurant, hotel, gas station, manufacturer, bank, law firm, hospital, small loan company, barber shop, funeral parlor, beauty salon, night club, and other local retail service, trade, and professional establishment . . . . Again, we must say that if the interstate commerce clause can be broadened and deepened to this extent, then the concept of *intrastate* commerce is obsolete.

Id. at 108-09 (separate minority views of Representatives Richard H. Poff and William C. Cramer) (emphasis in original).

[93] Senator Javits wrote *Discrimination—USA* (1960). In its 300 pages there is not a mention of partnerships or invitations to partnership, let alone law partnerships or relevant mentions of lawyers.

issues that arise in applying Title VII to decisions as sensitive as the decision whether to admit an associate to partnership in a law firm." EEOC Brief at 16.[94]

But the two Senators did not obliquely approach, let alone confront, even the "employment" of lawyers at law firms. They did not mention lawyers; they spoke of doctors instead. They did not discuss law partnerships; they spoke of hospitals instead. EEOC Brief at 17-19 (quoting 118 Cong.Rec. 3800-02 (1972) (Statements of Senators Williams and Javits)).

The Senators' silence regarding law firms was not mere inadvertence caused by a lack of familiarity. Both Senators, like the vast majority of their colleagues, were lawyers.

Sixty-six members of the Senate which passed Title VII were lawyers.[95] All 15 members of the Senate Committee on the Judiciary which considered an earlier version of the bill were lawyers; one committee member was an associate employed by a law partnership. Three were of counsel to law partnerships.[96] In the House of Representatives, 245 members were lawyers.[97] All 35 members of the House Committee on the Judiciary which considered the bill were lawyers. Nineteen were affiliated with law firms and at least 11 were partners.[98]

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[94] The only other authority cited in the EEOC Brief is the nonexistence of an express exemption for partners as employees, EEOC Brief at 14-16, and the inclusion of educational institutions within Title VII, which, of course, occurred only after extensive debate. EEOC Brief at 16-17.

[95] 20 Cong. Q. Almanac 34 (1964).

[96] Cong. Directory, 88th Cong., 2d Sess. (1964) (biographies and committee membership); Martindale-Hubbell Law Directory (1964) (law firm affiliation). Three of the committee members were not listed in Martindale-Hubbell.

[97] 20 Cong. Q. Almanac 34 (1964).

[98] Cong. Directory, 88th Cong., 2d Sess. (1964) (biographies and committee membership); Martindale-Hubbell Law Directory (1964) (law firm affiliation). Four of the committee members were not listed in Martindale-Hubbell and the nature of the firm affiliation was not listed for eight others.

In March of 1972, 66 senators were lawyers.[99] Of the 17 members of the Senate Committee on Labor and Public Welfare, which considered the amendments to Title VII, 11 were lawyers and the Chairman was a partner in a law firm.[100] Two hundred thirty-three members of the House were lawyers.[101] Of the 38 members of the House Committee on Education and Labor which considered the amendments, 19 were lawyers, of whom one was of counsel to a law partnership and two were in law firms which carried their names.[102]

The Speaker of the House of Representatives, John W. McCormick, had been a partner in the Boston law firm of McCormick & Hardy.[103] The Chairman of the House

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[99] When the 92d Congress began, 65 of the 100 Senators were lawyers. Cong. Q. Weekly Rpt. 129 (Jan. 15, 1971). Two Senators were replaced by March 1972. 118 Cong.Rec., Index at 3-4 (Jan. 18-Oct. 18, 1972). The two newcomers were lawyers and only one of those departing was a lawyer. *See* Biographical Directory of the American Congress, Vol. 1774-1971; Cong. Staff Directory, 92d Cong., 2d Sess. (1972).

[100] Cong. Staff Directory, 92d Cong., 2d Sess. (1972) (profession and committee membership); Martindale-Hubbell Law Directory (1972) (law firm affiliation). Four of the committee members who were lawyers were not listed in Martindale-Hubbell.

[101] When the 92d Congress began, 236 of the 434 members were lawyers. Cong. Q. Weekly Rpt. 129 (Jan. 15, 1971). Seven of those members were no longer in the House by March 1972, and five of them had been replaced. 118 Cong.Rec., Index at 5-8 (Jan. 18-Oct. 18, 1972). Four of those departing, but only one of the newcomers, were lawyers. *See* Biographical Directory of the American Congress, Vol. 1774-1971; Cong. Staff Directory, 92d Cong., 2d Sess. (1972).

[102] Cong. Staff Directory, 92d Cong., 2d Sess. (1972) (biographies and committee membership); Martindale-Hubbell Law Directory (1972) (law firm affiliation). Six of the committee members who were lawyers were not listed in Martindale-Hubbell.

[103] Cong. Directory, 88th Cong., 2d Sess. at 72-73 (1964); II Martindale-Hubbell Law Directory at 840 (1972); II Martindale-Hubbell Law Directory at 1571 (1964); I Martindale-Hubbell Law Directory at 1040 (1931).

Committee on the Judiciary, Emanuel Celler, was also the Celler of the New York City law partnership, Weisman, Celler, Allan, Spett & Sheinberg.[104] The ranking minority member of that committee, William M. McCulloch, was the McCulloch of the Piqua, Ohio law partnership, McCulloch, Felger, Fite and Gutman.[105]

Senate Minority Leader Everett McKinley Dirksen, whose support was essential for passage of the Act,[106] was also counsel to the Peoria, Illinois law partnership, Davis, Morgan & Witherell.[107] Senator Harrison A. Williams, Jr., the Williams of the Elizabeth, New Jersey law partnership, Pollis, Williams, Pappas & Dillon,[108] was a prominent supporter of the bill, as was Senator Jacob K. Javits, the former partner in and then counsel to New York City's Trubin, Sillcocks, Edelman & Knapp.[109]

Because a majority of the members of Congress were lawyers, their silence cannot be construed as reflecting an intention to include invitations to law partnership within the scope of Title VII. Instead, Congress regarded law partners "as so clearly outside the Act that no specific exclusionary provision was thought necessary." *NLRB v. Bell Aerospace Co.*, 416 U.S. at 283 (discussing exclusion of managers from the NLRA).

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[104] Cong. Directory, 88th Cong., 2d Sess. at 109 (1964); III Martindale-Hubbell Law Directory at 511 (1972); III Martindale-Hubbell Law Directory at 2326 (1964).

[105] Cong. Directory, 88th Cong., 2d Sess. at 131 (1964); V Martindale-Hubbell Law Directory at 433B-34B (1983); III Martindale-Hubbell Law Directory at 2862B (1972); III Martindale-Hubbell Law Directory at 5340 (1964).

[106] "Senator Dirksen supplied the required magic, as Democratic leaders are quick to affirm." Lewis, *Strategy of Closure*, N.Y. Times, June 11, 1964, at 21, col. 5.

[107] Cong. Directory, 88th Cong., 2d Sess. at 42 (1964); I Martindale-Hubbell Law Directory at 2228 (1964).

[108] Cong. Staff Directory, 92d Cong., 2d Sess. at 64 (1972); III Martindale-Hubbell Law Directory at 375B-76B (1973).

[109] Cong. Staff Directory, 92d Cong., 2d Sess. at 68 (1972); IV Martindale-Hubbell Law Directory at 1824B-25B (1983).

In *Ferri v. Ackerman*, 444 U.S. 193, this Court considered the intention of the 1964 Congress—the Congress and the Committees that were simultaneously considering Title VII—regarding the independence of lawyers appointed under the Criminal Justice Act of 1964, 18 U.S.C. § 3006A. A unanimous Court found that "Congress clearly wanted appointed counsel *to share* as much of *retained counsel's characteristic independence from the Government* as was possible." *Ferri v. Ackerman*, 444 U.S. at 199 n.16 (emphasis added). The Court said that "[a]n indispensable element of the effective performance of . . . [a lawyer's] responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation." *Id.* at 204.

As Morris B. Abram, Esq., has written, "[T]he construction of Title VII urged by plaintiff would have amazed the legislators who voted for it." Defendant's Reply Brief at 11, *Lucido v. Cravath, Swaine & Moore*, 425 F.Supp. 123 (S.D.N.Y. 1977).

In 1964, less than one month prior to passage of the Act, Senator Norris Cotton, then the Cotton of the Lebanon, New Hampshire, law partnership, Cotton, Tessreau, Stebbins and Johnson,[119] sought to exclude from Title VII employers with fewer than 100 employees. Clearly understanding that invitations to become partners were not covered by the bill, he used a comparison: "when a small businessman . . . *selects an employee*, he comes very close to *selecting a partner*." 110 Cong. Rec. 13,085 (1964) (emphasis added). If both "select[ing] an employee" and "selecting a partner" had been included in the bill, the Senator's remarks would have been meaningless. He underscored this by continuing: "when a businessman selects a partner, he comes dangerously close to the situation he faces when he selects a wife. A small business . . . stands or falls . . . on

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[119] Cong. Directory, 88th Cong., 2d Sess. at 94 (1964); III Martindale-Hubbell Law Directory at 98 (1972); II Martindale-Hubbell Law Directory at 3967 (1964).

the congeniality and skill and ability of the man or *the partners who own* it *and the persons who work for them* . . . ." *Id.* (emphasis added).

In 1972, when the Senate debated the comprehensive amendment of Title VII, Senator Cotton returned to the same theme: "In the firms employing 25 persons, or even 30, . . . when they *select an employee*, it is very much like *selecting a partner*." 118 Cong.Rec. 2391 (1972) (emphasis added).[111]

Treating a "partner" in a law firm as an "employee" for purposes of Title VII would "obliterate the line between" employers and employees.[112] Arguments marshalled by Petitioner mirror those rejected by the Court in *Bell Aerospace Co.* Just as the dissent there argued that the NLRA was "very plain on its face" and contained only "narrow precisely defined" exceptions, *NLRB v. Bell Aerospace Co.*, 416 U.S. at 297 (White, J., dissenting), the Petitioner here maintains that Title VII must be liberally construed and that "no [partnership] exemptions should be implied." Petitioner's Brief at 26. And just as the dissent there argued that the Court's reading of the NLRA deprived "hundreds of thousands" of workers of its benefits, *NLRB v. Bell Aerospace Co.*, 416 U.S. at 307 n.3 (White, J., dissenting) (citation omitted), the Petitioner here raises the specter of thousands of lawyers without the protection of Title VII. Petitioner's Brief at 15-18.

The dissent in *Bell Aerospace Co.* also argued that the exclusion of "managerial employees" was inconsistent with the NLRA's inclusion of "professional employees." *NLRB v. Bell Aerospace Co.*, 416 U.S. at 297-98 (White,

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[111] Five days earlier, Senator Cotton had stated: "When . . . the proprietor or the organization operating [a small] business selects an employee, that is an intensely personal relationship. It is almost like selecting a partner." 118 Cong.Rec. 1524 (1972).

[112] *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 494 (1947) (Douglas, J., dissenting).

J., dissenting). In rejecting this contention, the Court pointed out that, unlike "managerial employees," "professional employees" had not been "defined in terms of their authority 'to formulate, determine and effectuate management policies.'" *Id.* at 294 n.13 (citation omitted).

Similarly, the EEOC suggests that the refusal to include partnership opportunities within the scope of Title VII would be inconsistent with Congress' rejection of the amendment that would have excluded a doctor's professional employment at a hospital from the scope of the statute. *See* EEOC Brief at 17-19. But "professionals," unlike "partners," are not defined in terms of ownership interests. *See* Webster's New International Dictionary of the English Language 1976 (2d ed. 1944).[113]

B. Prior Judicial Rulings

Stymied by the language of Title VII, the 1964 Congress, the 1972 Congress, and the Eleventh and Seventh Circuits,[114] Petitioner seeks refuge in this Court's decisions and stresses that "[t]his Court has stated that 'it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with the[] unusually important precedents from this and other federal courts and that it expected its enactment to be interpreted in conformity with them.'" Petitioner's Brief at 30 (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 699 (1979) (citation omitted)). Petitioner might have added that Congress "is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change." *Lorillard v. Pons*, 434 U.S. at 580; *see Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979); *Al-*

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[113] *Cf. NLRB v. Yeshiva University*, 444 U.S. 672 (1980) (faculty members exempt from NLRA coverage because their interests and those of the university were aligned).

[114] *Hishon v. King & Spalding*, 678 F.2d 1022; *Burke v. Friedman*, 556 F.2d 867 (7th Cir. 1977).

bemarle Paper Co. v. Moody, 422 U.S. 405, 414 n.8 (1975).[115]

Congress was familiar with this Court's interpretation of "commerce." Congress, many of whose members were members of home-town law firms, knew that this Court had "implied [that] the practice of a learned profession is not 'trade or commerce,'" *Goldfarb v. Virginia State Bar*, 421 U.S. at 786 n.15 (citations omitted), and in *Federal Base Ball Club, Inc. v. National League*, 259 U.S. 200, 209 (1922), had stated: "a firm . . . sending out a member to argue a case . . . does not engage in . . . commerce because the lawyer goes to another State." Congress did not know in 1972 when it amended Title VII that in 1975 *Goldfarb* would hold that a restraint on local legal services may affect commerce. Neither did the NLRB. *Bodle, Fogel, Julber, Reinhardt & Rothschild*, 206 N.L.R.B. 512, 513 (1973) (law firm "not itself engaged in . . . commerce"), *overruled*, *Foley, Hoag & Eliot*, 229 N.L.R.B. 456 (1977) (relying on *Goldfarb*).

To find a congressional intention to broadly interpret the words "employee" and "employment" in Title VII "in the same manner as it had used them in the National Labor Relations Act, the Social Security Act, and the Fair Labor Standards Act," Petitioner urges:

> Congress was undoubtedly aware . . . that this Court had interpreted the term 'employment' in each of these statutes very broadly by looking at the economic reality of a particular relationship, and had rejected attempts to narrow the coverage of those Acts through the use of more restrictive common law definitions of an 'employee.'

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[115] In 1972 Congress extended the coverage of Title VII to certain government and other previously excluded employees and employers. Equal Employment Opportunity Act of 1972, Pub.L.No. 92-261, §§ 2(1), (5), 86 Stat. 103 (1972). Neither partners nor would-be partners were added to Title VII's coverage. *See id.*

Petitioner's Brief at 28-29 (citing *NLRB v. Hearst Publications*, 322 U.S. 111 (1944); *United States v. Silk*, 331 U.S. 704 (1947); and *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28 (1961)).

What "Congress was undoubtedly aware" of was that after this Court in *Hearst Publications* upheld the NLRB's determination that certain newsboys were employees rather than independent contractors, Congress reversed the Court and "repudiated" *Hearst Publications* by specifically excluding " 'any individual having the status of an independent contractor' " from the definition of employee. *Allied Chemical & Alkali Workers Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166, 167 (1971).[116]

On Petitioner's own terms, this post-*Hearst Publications* congressional action makes clear that, just as with

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[116] The House Report explained:

> *"An 'employee,' according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, * * * means someone who works for another for hire.* But in the case of National Labor Relations Board v. Hearst Publications, Inc.[,] . . . holding the merchants to be 'employees' of the publisher of the papers was most far reaching. It must be presumed that when Congress passed the Labor Act, *it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up.* In the law, there always has been a difference, and a big difference, between 'employees' and 'independent contractors.' *'Employees' work for wages or salaries under direct supervision.* * * * It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words not far-fetched meanings but ordinary meanings."

Allied Chemical & Alkali Workers Local Union No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. at 167 (quoting H.R. Rep. No. 245, 80th Cong., 1st Sess. 18 (1947) (emphasis added and by the Court)); *see also id.* at 166, 168 (although in "doubtful cases resort must

the term "employer,"[117] Congress intended that "employee" have its ordinary meaning. *Id.* at 168.

The history of *United States v. Silk*, 331 U.S. 704 (1947), which involved independent contractor coverage under the Social Security Act, was described in *United States v. W. M. Webb, Inc.*, 397 U.S. 179, 182-88 (1970). *Silk* "stressed many of the factors that had been important in common-law determinations of employee status," but "also contained language that could be read to detach the question of statutory coverage from the common-law tests." *Id.* at 184-85.

After *Silk* and a similar decision in *Bartels v. Birmingham*, 332 U.S. 126 (1947), "the executive agencies set about replacing their original regulation, which had defined the employment relation in terms of the incidents of employment at common law, with a new regulation that would embody the test of 'economic reality.'" *United States v. W. M. Webb, Inc.*, 397 U.S. at 185 (footnote omitted). The new regulation did not take effect because an "undoubtedly aware" Congress in 1948 resolved the matter by amending the Internal Revenue Code and the Social Security Act to exclude from the definition of employee "any individual (except an officer of a corporation) who is not an employee under . . . common-law rules." H.R.J.Res. 296, 62 Stat. 438 (1948).

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still be had to economic and policy considerations," retired workers were not employees for purposes of collective bargaining because "the legislative history of § 2(3) itself indicates that the term 'employee' is not to be stretched beyond its plain meaning embracing only those who work for another for hire"); *NLRB v. United Insurance Co.*, 390 U.S. 254, 256 (1968) ("there is no doubt that we should apply the common-law agency test here in distinguishing an employee from an independent contractor").

[117] Senator Clark explained during the Senate debate that the term "employer" in Title VII was to have its "common dictionary meaning, except as expressly qualified by the act." 110 Cong.Rec. 7216 (1964).

As this Court stated in *Webb*:

> The [Senate Finance] Committee seems to have thought that the *Silk* and *Bartels* decisions had applied traditional common-law standards, despite the language in the opinions suggesting a less constrictive approach. However, noting that the Treasury Department claimed support in those decisions for its contemplated new departure, the Committee declared: "But if it be contended that the Supreme Court has invented new law for determining an 'employee' under the social-security system in these cases, then the purpose of this resolution is to reestablish the usual common-law rules, realistically applied."

United States v. W.M. Webb, Inc., 397 U.S. at 186 (citation omitted).

Knowing "that Congress was undoubtedly aware" is important, but surely the EEOC and Petitioner were "undoubtedly aware" of the EEOC's actual adoption of the Social Security Act's definition of employee. *See* text, *infra* at 58.

Neither Petitioner nor the EEOC mentioned that this Court in *Silk* actually cited with approval Treasury Regulation 90, promulgated under Title IX of the Social Security Act, Art. 205. It states:

> "Individuals performing services as independent contractors are not employees. *Generally, . . . lawyers . . . and others who follow an independent . . . profession, in which they offer their services to the public, are independent contractors and not employees.*" 26 C.F.R. § 400.205. See also Treasury Regulation 91, 26 C.F.R. § 401.3.

United States v. Silk, 331 U.S. at 714-15 n.8 (emphasis added).

Petitioner's third case, *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28 (1961), involved members of an incorporated cooperative who were paid for homework on a piece-rate basis fixed by the cooperative. This Court held that they were employees for purposes of the

Fair Labor Standards Act.[118] Relying on the legislative history, this Court wrote that "we would be remiss, in light of this history, if we construed the Act loosely so as to permit this homework to be done in ways not permissible under the Regulations." *Id.* at 31.[119]

Petitioner contends that *Goldberg* demonstrates that "there is nothing inherently inconsistent between the coexistence of a proprietary and an employment relationship." Petitioner's Brief at 39 (emphasis omitted). In *Goldberg*, this Court stated, "If members of a trade union bought stock in their *corporate* employer, they would not cease to be employees within the conception of this Act. For the *corporation would* "suffer or *permit*" *them to work* whether or not they owned one share of stock or none or many." *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. at 32 (emphasis added). The Court treated the "cooperative" relationship as though it were the kind of transparency that would occur if law firms unethically termed "associates" "partners." *See* text, *infra* at 60. The members of the cooperative in *Goldberg* were

> not self-employed; nor . . . independent . . . . Apart from formal differences, they are engaged in the same work they would be doing whatever the outlet for their products. . . . [T]he management can expel them for substandard work or for failure to obey the regulations. . . . Apart from the other considerations we have mentioned, these powers make the de-

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[118] A person became a member of the cooperative by paying three dollars and agreeing to the articles and bylaws. Each member had one vote; the certificates were nontransferable; and a person could only have one membership. Members were not responsible for the cooperative's debts. No interest or dividends were paid except in the manner and amount provided in the bylaws. *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. at 29-30.

[119] The statute authorized the Administrator "to make 'such regulations . . . as are . . . appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this Act.'" *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. at 30.

> vice of the cooperative too transparent to survive the statutory definition of 'employ' and the Regulations governing homework.

Goldberg v. Whitaker House Cooperative, Inc., 366 U.S. at 32-33.

There has not been a whisper about a transparent device in this case.

C. EEOC Interpretations

Amici agree with Petitioner that an interpretation by the EEOC should be given " 'deference.' " [120] Petition for a Writ of Certiorari at 21 (Dec. 3, 1982) (citation omitted). They seem to believe that amicus curiae positions are interpretations.[121] None of them, however, has provided the Court with the actual interpretations that do exist. They follow.[122]

1. *EEOC Definition for Reporting Purposes*

Since 1966, the EEOC has interpreted Title VII to exclude partners from the definition of "employee" for the

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[120] *See, e.g.*, Illinois and New York Women's Brief at 6, 14 (citation omitted).

[121] Petitioner so stated in the Petition for En Banc Consideration, at 6 n.2, *Hishon v. King & Spalding*, 678 F.2d 1022 (Mar. 23, 1982). But, as the Second Circuit has pointed out,

> an *amicus curiae* is no more a witness than any other advocate. . . . We cannot accept the [Commodity Futures Trading] Commission's current litigating position as an "interpretation" by the Commission . . . .

Ames v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 567 F.2d 1174, 1177 n.3 (2d Cir. 1977) (citing *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 156 (1944)).

[122] *See Nashville Gas Co. v. Satty*, 434 U.S. 136, 142 n.4 (1977) ("[L]ongstanding administrative construction is entitled to great weight, particularly when, as here, Congress has revisited the Act and left the practice untouched. Such a history of administrative construction may add a gloss or qualification to what is on its face unqualified statutory language."); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 417-18 (1945) (bulletin issued *contemporaneously* with regulation and first quarterly report to Congress accorded considerable weight in interpreting the regulation).

purpose of reporting the racial, ethnic, and sexual makeup of an employer's workforce as is required by the Act. For sixteen years, the EEOC has said that an employee is "any individual on the payroll of an employer who is an employee for purposes of the employer's withholding of Social Security taxes." EEOC Standard Form 100 Instruction Booklet at 3, *reprinted in* 1 Empl.Prac. Guide (CCH) ¶ 1881, at 1320 (1981).[123] Additionally, where Title VII's definition of "employee" seemed to vary from the word's definition for Social Security purposes, the EEOC specifically aligned its definition with that of the Internal Revenue Code.[124]

In 1978, the EEOC proposed an "economic realities" definition of "employee," 43 Fed.Reg. 32,280, 32,282 (1978), to "eliminat[e] the [gap] in the present definition while retaining Social Security taxes as a firm guideline in most instances for determining the existence of an employment relationship." *Id.* at 32,282-83.[125] The proposed definition was not implemented.

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[123] The Social Security Act's definition of "employee," 42 U.S.C. § 410(j), provides that an employee is "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee." *Accord* 26 U.S.C. § 3121(d)-1(c)(1) (Federal Insurance Contributions Act).

To be a partner, an individual must be a partner in fact and not merely by label. S.S.T. 239, 1937-2 C.B. 402; *see also* Rev.Rul. 69-184, 1969-1 C.B. 256 (emphasis added), which provides: "*Bona fide members of a partnership are not employees of the partnership* . . . . Remuneration received by a partner . . . is not "wages" with respect to "employment" . . . [and] is not subject to Federal income tax withholding." The Social Security Administration regulations agree: employee means common-law employee. 20 C.F.R. § 404.1005(b) (1982).

[124] *See* EEOC Standard Form 100 Instruction Booklet at 3, *reprinted in* 1 Empl.Prac. Guide (CCH) ¶ 1881, at 1320.

[125] As support for this "expanded definition of employees," 43 Fed.Reg. at 32,281, the EEOC cited *Mathis v. Standard Brands Chemical Industries*, 10 Fair Empl.Prac.Cas (BNA) 295 (N.D.Ga. 1975). The *Mathis* court stated:

2. *General Counsel Opinions*

Soon after Title VII became effective, the EEOC's General Counsel issued an "interpretation" reported in the Digest of Legal Interpretations Issued or Adopted by the Commission, October 9, 1965 through December 31, 1965, § I(B)(6), at 2-3 (digest of General Counsel Opinion of Oct. 11, 1965):

> A law firm having the requisite number of employees as prescribed in section 701 is an "employer" within the meaning of the Act. However, partners of the firm may not be "employees" within the meaning of Title VII.

Later, in its first year of existence, the EEOC limited the exclusion of "partners" from the term "employees" by restricting it to actual partners:

> [T]he determination of whether partners of the [law] firm are "employees" within the meaning of Title VII must be determined on a case-by-case basis.

EEOC, First Annual Digest of Legal Interpretations, July 1965-July 1966, § I(B)(5), at 6 (subsequent digest of General Counsel Opinion of Oct. 11, 1965).[128] The "determination . . . [to be made] on a case-by-case basis" was again clarified in a 1966 EEOC General Counsel opinion letter:

> Employment must be distinguished from the independent contractual associations of business entities for the latter are not covered by Title VII. While it would be a desirable goal to eliminate racial discrimination in all business enterprises, it does not appear that Congress intended such a broad objective for Title VII. The emphasis on the word "employment" in the legislative history supports such a conclusion.

Id. at 297. The court expressly rejected the EEOC's amicus position that an employment relationship was not needed: under it "all contractual relationships between businessmen would logically be subject to the Act's coverage." *Id.* at 297 n.1.

[128] This EEOC General Counsel interpretation is available only in the form of these two digests. The EEOC has represented to counsel that it is unable to locate a copy.

> As to the treatment of junior partners of a law firm, we have not as yet had occasion to pass on a particular fact situation, but we incline to the view that the *term "partner"* is not decisive if their perquisites and tenure are more consistent with the status of employee than of co-owner of the enterprise.[127]

1 Empl.Prac. Guide (CCH) ¶ 17,304.18 (1966) (emphasis added).

These interpretations contemplated "sham" but ostensible partnership arrangements into which lawyers may not enter.[128] *Cf. EEOC v. Rinella & Rinella*, 401 F.Supp. 175, 179-81 (N.D.Ill. 1975) (rejecting argument that "associates" were "independent contractors" rather than "employees"). An example is an arrangement where "no partnership relation in fact exists, . . . the senior member of the group receiv[ing] the income and pay[ing] the other members fixed salaries as . . . employees." ABA Comm. on Professional Ethics and Grievances, Formal Op. 106 (1934); *see also id.* 277 (1948); *id.* 126 (1935); *id.* 115 (1934).

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[127] In *Lucido*, when defendant Cravath, Swaine & Moore referred to the EEOC General Counsel's October 11, 1965 interpretation that "partners of the firm may not be 'employees' within the meaning of Title VII," the EEOC stated: "All such opinions were withdrawn. *Cf.* Federal Register, Vol. 35, p. 18692 (Dec. 9, 1970). . . . [*T*]*he question is not yet settled.*" Brief of EEOC as Amicus Curiae at 5 n.2, *Lucido v. Cravath, Swaine & Moore*, 425 F.Supp. 123 (S.D.N.Y. 1977) (emphasis in original and added).

In the cited *Federal Register*, the EEOC merely stated that 42 U.S.C. § 2000e-12(b) applies only to addressees of General Counsel opinion letters. 35 Fed.Reg. 18,692 (1970). Additionally, this Court has relied on the EEOC's early digested legal interpretations of Title VII. *See Nashville Gas Co. v. Satty*, 434 U.S. 136, 142 n.4 (1977).

[128] It is unethical for lawyers to represent that they are partners "unless they are *in fact* partners." Model Code of Professional Responsibility DR 2-102(C) (1980) (emphasis added); *see also id.* EC 2-13 n.21.

3. *Other EEOC Interpretations*

Prior to the filing of *Burke v. Friedman*, 556 F.2d 867 (7th Cir. 1977), the EEOC dismissed a charge against four Friedman accounting firm partners "for want of subject matter jurisdiction on the grounds that defendants employed fewer than fifteen employees." *Id.* at 868. The Friedman partners employed thirteen nonpartners. In conformity with its own interpretations, the EEOC held that it was without jurisdiction because partners were not employees. *Id.* The district court and the Court of Appeals for the Seventh Circuit agreed. *Id.* at 869, 870.[129]

In 1980, citing *Burke*, the EEOC held that "trustees are not employees of the trust, rather they are employers who manage and control the business of the trust fund."[130] EEOC, Commission Decision No. 80-23 (Aug. 27, 1980), *reprinted in* 2 Empl.Prac. Guide (CCH) ¶ 6813, at 4923-24 (May 1982).

In 1981, the acting General Counsel apparently had lawyers and law partnerships on her mind when she filed an amicus curiae brief which explained *Burke* to the Ninth Circuit in a case involving physicians: "[T]he law [sic] partners were . . . 'employers who own and manage the operations of the business.' . . . *The [Burke] court logically reasoned that partners could not be both employer and employee.*" Brief of the Equal Employment

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[129] In an Age Discrimination in Employment Act case, the court cited to its decision in *Burke* for the principle that "a partner is not an employee." *Zimmerman v. North American Signal Co.*, 704 F.2d 347, 352 (7th Cir. 1983); *cf. EEOC v. Rinella & Rinella*, 401 F.Supp. at 181 ("Since the firm is not a partnership, and the associates are not listed as 'of counsel,' it is only reasonable to conclude that they are employed by the firm.").

[130] Congress considered "trusts" and termed them "employers" in 42 U.S.C. § 2000e(b), the same statutory provision that terms "partnerships" "employers." *Cf.* EEOC, Commission Decision No. 75-273 (June 9, 1975) (board of directors held not employees), *reprinted in* 11 Fair Empl.Prac.Cas. (BNA) 1485 (1976).

Opportunity Commission as *Amicus Curiae* at 20 n.15, *Gomez v. Alexian Brothers*, 698 F.2d 1019 (9th Cir. 1983) (citation omitted) (emphasis added).

The EEOC's amicus curiae position in this Court is that "[w]hether partners are themselves employees is immaterial." EEOC Brief at 6.

D. Partnership Is Neither an Employment Opportunity Nor a Term, Condition, or Privilege of Employment

Petitioner asserts that the "opportunity of *promotion* to partnership" was an " 'employment opportunity' " and a " 'term, condition or privilege of employment.' " Petitioner's Brief at 42 (emphasis added). "[T]he *Hishon* court has probably taken the correct approach to Title VII [in rejecting this argument]. There is no particular indication that Title VII was intended to cover decisions as to whom one will voluntarily associate with in a *true* business partnership." 1 A. Larson, Employment Discrimination § 5.23, at 2-20 (1983) (emphasis in original). Given the absence of an " 'affirmative intention' " by Congress to adopt Petitioner's stance—indeed, given that it intended to exclude partnership decisions from Title VII—Petitioner's "theory" must be rejected because "jurisdiction here would give rise to serious constitutional questions." *NLRB v. Catholic Bishop*, 440 U.S. at 501.

The EEOC's reliance upon Title VII cases involving retirement benefits and health or disability insurance is misplaced. " '[T]erms [or] conditions . . . of employment,' as used in Title VII, include 'fringe benefits' such as pension rights and retirement and disability benefits, all of which are now well recognized as 'integrally related to the entire wage structure.' " [131]

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[131] *Gilbert v. General Electric Co.*, 519 F.2d 661, 663 (4th Cir. 1975), *rev'd on other grounds*, 429 U.S. 125, 128 (1976) ("As part of its total compensation package, General Electric provides non-occupational sickness and accident benefits to all employees . . . ."); *see* 29 C.F.R. § 1604.9(a) (1982) (" 'Fringe benefits,' as used

Petitioner's reliance upon NLRB cases begs the issue.[132] NLRB principles only "guide, but do not bind, courts in tailoring remedies under Title VII." *Ford Motor Co. v. EEOC*, 102 S.Ct. 3057, 3063 n.8 (1982). "[P]rinciples developed for use in the industrial setting cannot be 'imposed blindly' " on the legal profession. *NLRB v. Yeshiva University*, 444 U.S. 672, 681 (1980) (citation omitted); *cf. Goldfarb v. Virginia State Bar*, 421 U.S. at 788 n.17 ("unrealistic to view the practice of professions as interchangeable with other business activities").

Central to the NLRA is the protection of the organizational and collective bargaining rights of non-supervisory

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herein, includes medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment."); *see also Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 51 U.S.L.W. 4837, 4840 (U.S. June 20, 1983) ("Health insurance and other fringe benefits are 'compensation, terms, conditions or privileges of employment.' ").

[132] The NLRB cases also are factually inapposite. In *NLRB v. Bell Aircraft Corp.*, 206 F.2d 235 (2d Cir. 1953), the employer wanted to promote the employee to a supervisory position. It delayed the promotion until the union's charge regarding the employee's participation in a strike was resolved. "[T]he union disposed of all the charges against the employees who had returned to work before the termination of the strike; and, on being so notified, the employer promoted [the employee] to the assistant foreman position, *which had been held open for him.*" *Id.* at 238 (emphasis added).

Petitioner's characterization of *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973), as involving "an employee [who] was denied promotion to a supervisory position which was outside the coverage of the NLRA because of his union activities" is inaccurate. *See* Petitioner's Brief at 43. In *Golden State*, a driver-salesman, after being unlawfully discharged, was the beneficiary of an NLRB order that he be reinstated with backpay. *Golden State Bottling Co. v. NLRB*, 414 U.S. at 170 n.1. At the time of his discharge he was the company's "leading driver-salesman." *Id.* at 187. Before complying with the command of the NLRB, "Golden State began converting its top driver-salesmen to distributors, or independent contractors," *id.*, and subsequently sold its bottling business to All American Beverages, Inc. Because All American knew of the pre-existing order at the time of its pur-

employees. *See* 29 U.S.C. § 161. To protect them, the NLRA focuses on the reaction by supervisory employees to the activities of protected employees. To do this, the NLRA must have an artificial definition of "employee," so it excludes "any individual *employed* as a supervisor." 29 U.S.C. § 152(3) (emphasis added). The opportunity for promotion of which NLRA cases speak is only an opportunity for promotion to another position *as an employee*.[133]

Election to partnership is not a promotion. It is a change in status from employee to employer-owner—a change of kind, not degree.[134] Petitioner and amici illustrate this by stuttering when they describe what happened. To Petitioner, there was a denial of "promotion," and Petitioner develops an entire "partnerships are corporations" argument to prove it. Petitioner's Brief at 31-41. Indeed, Petitioner's theory is premised upon the

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chase, the NLRB held that All American was subject to its prior order. If "Golden State [had] already reinstated [the employee] with backpay before the sale of its business, and thereby fully complied with the Board's order, All American would have had no more obligation to employ him in the continuing business than it had to employ any of Golden State's other employees." *Id.* at 189 n.10.

[133] The EEOC inaccurately cites *Allied Chemical & Alkali Workers Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, for the proposition that "the comparable phrase 'terms and conditions of employment' in the National Labor Relations Act . . . includes *everything* that is 'an aspect of the relationship between the employer and employees.'" EEOC Brief at 8-9 (emphasis added). In *Allied Chemical*, the Court merely determined that the Act is *limited* to "issues that settle an aspect of the relationship between the employer and employees," *Allied Chemical & Alkali Workers Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. at 178, not that it *includes* "everything that is an aspect of the relationship."

[134] *Cf. NLRB v. Yeshiva University*, 444 U.S. at 682-83, 688 (citation omitted) ("faculty's professional interests . . . cannot be separated from those of the institution"; although "professional employees" expressly included in NLRA, faculty was "'clearly outside the act'" despite lack of "'specific exclusionary provision'").

"opportunity of *promotion* to partnership." *Id.* at 42 (emphasis added).

The EEOC, however, studiously avoids the word: "promotion" or "promoted" appears but thrice in the EEOC Brief and even then only in quotations attributable to Petitioner. EEOC Brief at 2, 3. To the EEOC, it seems that Petitioner has been denied "advancement," *id.* at 4, 5, 6, 9, 11, 12, and was not "elevat[ed]." *Id.* at 10. To the other amici, for example, Petitioner has been denied "admission," ADL Brief at 3; California Women's Brief at 8; and "progression." AAUW Brief at 40.

Congress shut the front door when it excluded partners from Title VII's definition of "employee." The Eleventh Circuit slammed the "backdoor" by "declin[ing] to extend the meaning of 'employment opportunities' beyond its intended context." *Hishon v. King & Spalding*, 678 F.2d at 1028.

E. Congress Did Not Intend to Repeal the Law of Partnership

In 1964 and 1972, a partnership, whether formed under the Uniform Partnership Act or the common law, had one overriding central characteristic. It was a "voluntary association based on contract." J. Crane & A. Bromberg, Law of Partnership § 5, at 38 (1968) (Law of Partnership). "X cannot become Y's partner without Y's so intending any more than he can without intending it himself." *Id.* at 43.

Petitioner tries to conjure this away by turning partnerships into corporations. To do this, Petitioner places primary reliance upon *Bellis v. United States*, 417 U.S. 85 (1974), and the fact that King & Spalding has a written partnership agreement to declare that law partnerships are corporations.[135] *Bellis* involved a grand jury

[135] The existence of a written partnership agreement is the result of lawyers practicing what they preach. Of course it is in writing. As the ABA's advertisement for its *Model Partnership Agreement for the Small Law Firm* states, "Without a partnership agreement, any law firm risks needless misunderstandings, discord, and potential dissolution." **Barrister, Spring 1983, at 40 (advertisement).**

subpoena for partnership records held "in a representative capacity." *Id.* at 97 (footnote omitted). For fifth amendment (self-incrimination) purposes, it was "the organizational character of the records and the representative aspect of" Bellis' possession of them that was important. *Id.* at 99.

"Of course, state [including Georgia] and federal law do not treat partnerships as distinct entities for all purposes," *id.* at 97 n.7, and it is "impossib[le to] mak[e] the duties arising from the relationship of master and servant applicable to a partnership and the partners composing it." *United States Fidelity & Guaranty Co. v. Neal*, 188 Ga. 105, 112, 3 S.E.2d 80, 84 (1939).[136] Petitioner does quote at length the portion of the late Judge Newell Edenfield's opinion which compares law partnerships to marriage. Petitioner's Brief at 6. That is the analogy used in basic texts.

> Except for marriage, it is hard to think of a voluntary legal relationship that is more intimate or complex, in human terms, than the normal partnership whose members work constantly together. This (along with business difficulties and ease of dissolu-

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[136] Because the employer-employee relationship "suggests . . . a contract . . . between two persons having a separate . . . existence in the eyes of the law," a partner "and the partnership can not be considered as separate and distinct," *United States Fidelity & Guaranty Co. v. Neal*, 188 Ga. at 110, 111, 3 S.E. 2d at 83; *see also Lester Witte & Co. v. Rabun County*, 245 Ga. 382, 265 S.E.2d 4 (1980), so a partner cannot be an employee of the partnership and has no coverage under Georgia's worker's compensation law. *United States Fidelity & Guaranty Co. v. Neal*, 188 Ga. 105, 3 SE.2d 80; *Scoggins v. Aetna Casualty & Surety Co.*, 139 Ga.App. 805, 229 S.E.2d 683 (1976). Also, "under the [Uniform Partnership Act], whatever may be the case as to third persons, as between themselves the partners are not to be regarded as an entity." Law of Partnership § 54(d) at 315 n.32. "[T]he prevailing view [is that] the relation between parties associated in a business cannot be both partnership and employer-employee." *Id* § 16, at 86 n.99; *see also id.* § 3(c) at 24 (a partner is "an employer, which precludes his being an employee").

tion) contributes to the high divorce rate in partnerships as in marriage.

Law of Partnership at 1 n.1.[137]

Petitioner asks this Court to repeal the common law, the statutes of Georgia drawn from it,[138] Georgia's decisional law,[139] and the partnership law of the other 49

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[137] *See* Wallace, *Are You Meant to be a Partner?*, Barrister, Fall 1981, at 12, 12 ("Having a partner is worse than marriage!"); *see also* 15 Steps to Partnership at 61 (emphasis in original):

> In a large law firm survey, 61 percent of the respondents rated *personality* as an above-average consideration [in evaluating associates for partnership]. The remainder of the respondents indicated it to be of average importance vis-a-vis other considerations. Not one firm replied that it gives little consideration to personality. Law firms are like families; one argumentative, difficult, temperamental or egotistic person can throw the entire group into chaos. Law is a demanding profession and most lawyers do not want their time taken up by conflict.

[138] Georgia's statute requires "[t]he strictest good faith" in partners' dealings with one another. O.C.G.A. § 14-8-40 (1982). Partners, but not employees, are entitled to: "examine into the affairs of the firm," *id.* § 14-8-41; "have joint possession of [the firm's] effects," *id.*; "collect and apply [the firm's] assets," *id.*; "contract or otherwise bind the firm in matters connected with its business," *id.*; "equally . . . share the profits," *id.* § 14-8-45; if insolvent, have contribution from the solvent partners "to pay the amount of the pro rata liability of the insolvent partner for debts of the firm," *id.* § 14-8-46; bind "[a]ll the partners" by an act "within the legitimate scope of the business of the partnership," *id.* § 14-8-61; make "[a]ll the partners . . . responsible to innocent third persons" by committing "fraud . . . in matters within the scope of the business of the partnership," *id.* § 14-8-65; and make "[a]ll partners . . . liable for . . . torts . . . [if] committed by the partner within the legitimate scope of the business of the partnership." *Id.* § 14-8-66(a).

[139] Except for an equitable action for an accounting, *see Johnson v. Towsend*, 192 Ga. 522, 15 S.E.2d 790 (1941); *Miller & Son v. Freeman*, 111 Ga. 654, 36 S.E. 961 (1900), a partner surrenders the right to sue a partner, *United States Fidelity & Guaranty Co. v. Neal*, 188 Ga. 105, 3 S.E.2d 80, acts as a principal and as a

states and to ignore the "intimate or complex" relationship Crane and Bromberg describe.[140]

VII. ALTERNATIVE MEANS ARE AVAILABLE TO ENSURE AGAINST DISCRIMINATION IN THE LEGAL PROFESSION

The legal profession has not been indifferent to the increasing number of women within its ranks. Rather, it took action "to encourage more women to enter and realize their full potential within the legal profession." [141] ABA, Summary of Action of the House of Delegates at 31-32 (Aug. 1972). In 1973, these principles were incorporated into the ABA, Standards for the Approval of Law Schools, Standard 211 (1973), *reprinted in* ABA, Approval of Law Schools at 6-7 (1979).[142]

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general agent, *Gilmore v. Hammock*, 72 Ga.App. 35, 32 S.E.2d 844 (1945), makes statements or admissions, *Ward-Truitt Co. v. Nicholson*, 23 Ga.App. 672, 99 S.E. 153 (1919), or accepts payments, *Brady v. J. E. Phillips Mule Co.*, 27 Ga.App. 444, 108 S.E. 809 (1921), and binds the partnership and even a client, even if the client has dealt solely with another partner. *Lancaster v. Neal*, 41 Ga.App. 721, 154 S.E. 386 (1930). A partner can withdraw to dissolve a partnership and join to create a new one. *Harwell v. Cowan*, 175 Ga. 33, 165 S.E. 19 (1932); *see Stone v. First Nat'l Bank*, 117 Ga.App. 802, 162 S.E.2d 217 (1968).

[140] For federal tax purposes, there are four relevant "corporate characteristics:" (1) free transferability of interests; (2) limited liability; (3) centralization of management; and (4) continuity of life. Treas. Regs. § 301.7701-2(b)-(e), T.D. 7515. King & Spalding possesses none of them. The district court, to which the firm's complete partnership agreement was submitted, wrote, "[A]nyone denying that King & Spalding is a partnership would be laughed out of any court in Georgia, as well as the Internal Revenue Service." *Hishon v. King & Spalding*, 24 Fair Empl.Prac.Cas. (BNA) 1303, 1304 (N.D.Ga. 1980).

[141] At its earlier midyear meeting, the ABA "strongly condemn[ed] all forms of discriminatory hiring practices within the legal profession, whether on the basis of sex, religion, race, or national origin." ABA, Reports of the American Bar Association 154 (1972).

[142] *See* ABA, Summary of Action of the House of Delegates at 27-28 (Aug. 1981) (adding Standard 211(b) prohibiting admission

If occasional problems occur, there are purely private alternative remedies which do not intrude upon the unique status and role of attorneys. The court of appeals suggested that if "representations were deceptively made, then perhaps an action in breach of contract or misrepresentation may provide a more appropriate vehicle for the appellant to drive toward a legal remedy." *Hishon v. King & Spalding*, 678 F.2d at 1029. Additionally, an action under 42 U.S.C. §§ 1981 and 1982 may be available to members of racial groups who seek to enter into partnership contracts.[143]

Courts, including this one, have the power to address the issue under their rulemaking[144] and administrative

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policies precluding a diverse student body and Standard 211(d) regarding law school admission and employment policies directly relating to school's religious affiliation and purpose; redesignating Standard 211(b) as 211(c) and Standard 211(c) as 211(e)); *see also* ABA, Summary of Action of the House of Delegates at 25 (Aug. 1982) (revising Standard 211(d)).

[143] *See Johnson v. Railway Express Agency*, 421 U.S. 454, 459-60 (1975); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 436 (1968).

[144] All federal courts have statutory authority to "prescribe rules for the conduct of their business." 28 U.S.C. § 2071; *see* Fed.R. Civ.P. 83 ("Each district court . . . may . . . make . . . rules governing its practice . . . . In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."); *cf.* Sup.Ct.R. 5.4 ("Each applicant shall take the following oath or affirmation: I, ————, do solemnly swear (or affirm) that as an attorney and as a counselor of this Court I will conduct myself uprightly and according to law, and that I will support the Constitution of the United States.").

In addition, the Chief Justice has authority to submit certain issues to the Judicial Conference of the United States. *See* 28 U.S.C. § 331 ("the Conference shall make a comprehensive survey of the condition of business in the courts of the United States"); *cf.* Archer, *Blackballed!*, Barrister, Spring 1983, at 23, 24 ("on March 14, 1982, the Judicial Conference of the United States endorsed the principle that it is inappropriate for a judge to hold membership in any organization that practices invidious discrimination").

powers.[145] *See Ballard v. United States*, 329 U.S. 187, 193 (1946) (Court exercised its "power of supervision over the administration of justice" to include women in jury panels); *McNabb v. United States*, 318 U.S. 332, 340 (1943) ("Judicial supervision of the administration of criminal justice . . . implies the duty of establishing and maintaining civilized standards of procedure and evidence."). As this Court wrote in *Theard v. United States*, 354 U.S. 278, 281 (1957) (quoting *People ex rel. Karlin v. Culkin*, 248 N.Y. 465, 470-71, 162 N.E. 487, 489 (1928) (Cardozo, C.J.)):

> The two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included. The court's control over a lawyer's professional life derives from his relation to the responsibilities of a court. . . . "'Membership in the bar is a privilege burdened with conditions.' . . . The appellant was received into that ancient fellowship for something more than private gain. He became an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice."

VIII. THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED

Petitioner's charge was filed on November 19, 1979, J.A. 56, 542 days after King & Spalding decided not to invite Petitioner to become a partner. J.A. 10; J.A. 47-48; *see Hishon v. King & Spalding*, 678 F.2d at 1024. Because the record conclusively shows that Petitioner failed to comply with Title VII's 180-day limitation,[146]

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[145] *See also, e.g., In re Brose*, 51 U.S.L.W. 3898 (U.S. June 20, 1983) (Burger, C.J., dissenting).

[146] Petitioner's up-or-out claim is not properly before this Court. Petitioner's Complaint neither mentioned nor alleged discrimination under King & Spalding's up-or-out rule. *See* J.A. 12. Petitioner's first mention of the rule was in a brief filed on June 23, 1980, seeking to compel discovery from King & Spalding on the

Petitioner may not litigate this "test case." [147]

The only unlawful acts alleged by Petitioner, other than denial of partnership, are the freezing of her pay and her termination as a result of the operation of the up-or-out rule. But Petitioner admits that these were but the "direct consequence of King & Spalding's decision to refuse to admit Ms. Hishon to partnership." Petitioner's Brief at 47; *id.* at 15 (the refusal to elect Petitioner to partnership "resulted automatically in the termination of her employment"); *see Hishon v. King & Spalding*, 678 F.2d at 1030 (emphasis in original) (Tjoflat, J., dissenting) ("*direct* consequence of this decision . . . was to deny Hishon membership and to terminate her employment"). Thus, the termination and pay freeze were nothing other than the "delayed, but inevitable, consequence[s] of the denial of" partnership. *Delaware State College v. Ricks*, 449 U.S. 250, 257-58 (1980).

Although the Complaint never mentioned King & Spalding's up-or-out rule,[148] its existence and operation

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up-or-out rule. J.A. 165. King & Spalding opposed this discovery on the ground "that this information is only relevant to the *merits* of her underlying claim." J.A. 247 (emphasis in original).

Petitioner admitted as much, having stated:

> Plaintiff is plainly entitled to discovery as to the factual details of defendant's "up or out policy" for the purpose of demonstrating *how* that policy was applied and, thus, supporting her contention that termination of her employment was caused by defendant's decision to refuse to admit her to partnership on the basis of sex, and, therefore, constitutes unlawful employment discrimination covered by Title VII.

J.A. 214 (emphasis in original).

[147] Petitioner's Brief at 23 ("Although not by design, this case has become a test case of the rights not only of women, but also of blacks, Jews and other minorities . . . .").

[148] *See* J.A. 11 ("The actions of defendant . . . terminating plaintiff's employment constituted unlawful acts of discrimination against plaintiff because of her sex . . . ."); J.A. 12 ("these unlawful actions of sex discrimination by defendant against plaintiff

are not in dispute. King & Spalding has such a rule, but there is no allegation that it was applied to Petitioner differently than it was applied to others. *See* J.A. 31-32, 48, 165.[149]

As the district court found, "Neither in her pleading, briefs nor arguments does plaintiff even whisper or suggest that such applications [of the up-or-out rule] by defendant were in any way based on sex." *Hishon v. King & Spalding*, 24 Fair Empl.Prac.Cas. (BNA) at 1306 n.1.

To paraphrase the Court in *Ricks*:

> In order for [Petitioner to prevail, she] would have had to allege and prove that the manner in which [her] employment was terminated differed discriminatorily from the manner in which [King & Spalding] terminated other [associates] who also had been denied [partnership]. But no suggestion has been made that [Petitioner] was treated differently from other unsuccessful [partnership] aspirants. . . .
>
> In sum, the only alleged discrimination occurred . . . at the time the [partnership] decision was made and communicated to [Petitioner]. That is so even though [two] of the *effects* of the denial of [partnership]—the eventual loss of [employment and no further raises]—did not occur until later.

Delaware State College v. Ricks, 449 U.S. at 258 (emphasis in original); *accord, Chardon v. Fernandez*, 454

---

have been accomplished by the following . . . circumstances: . . . (c) Defendant discharged plaintiff as its employee effective December 31, 1979.").

[149] Petitioner suggested limits on discovery.

> If King & Spalding were to prevail on this threshhold question, discovery on the merits aimed at establishing that it has in fact discriminated against women and other minorities in its employment, promotion and compensation decisions, as well as discovery into matters of partner compensation for the purpose of establishing damages under Title VII, would be moot.

J.A. 82.

The district court agreed. J.A. 82. Later, Petitioner declined the district court's offer of a hearing on the motion to dismiss.

U.S. 6, 8 (1981) ("[T]he proper focus is on the time of the *discriminatory act*, not the point at which the *consequences* of the act become painful. The fact of termination is not itself an illegal act.") (citation omitted) (emphasis in original).

Although Petitioner requested King & Spalding to reconsider its decision in January 1979,[150] the 180-day limitation period commenced to run when the original decision was made in May 1978. "The grievance procedure [like Petitioner's request for reconsideration], by its nature, is a *remedy* for a prior decision, not an opportunity to *influence* that decision before it is made." *Delaware State College v. Ricks*, 449 U.S. at 261 (emphasis in original). The Court added: "We do not suggest that aspirants . . . should ignore available opportunities to request reconsideration. Mere requests to reconsider, however, cannot extend the limitations period applicable to the civil rights laws." *Id.* at 261 n.1.

IX. PETITIONER'S ALLEGATION UNDER THE UP-OR-OUT RULE IS NOT ACTIONABLE

The record is devoid of any facts or allegations tending to show that King & Spalding's up-or-out rule[151] was applied differently to Petitioner than to similarly situated males.[152] Petitioner seeks to dismiss this by stating

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[150] Petition for En Banc Consideration at 2-3, *Hishon v. King & Spalding*, 678 F.2d 1022.

[151] In a recent "LawPoll" conducted for the *American Bar Association Journal*, it was found that of the firms surveyed that had ten or more attorneys, 44 percent expected associates who did not make partner to find other employment whereas 23 percent responded that they retained the associates. 69 A.B.A.J. 1026 (1983).

[152] Nor can Petitioner claim that further discovery is needed on the up-or-out rule. Petitioner proposed the limitation on discovery, J.A. 82, and Petitioner's entire statement advising the Eleventh Circuit of the facts follows:

> ***The facts necessary to determine the legal issue in this case are not disputed.*** As stated by the majority:
>
> "In 1972, Elizabeth Hishon accepted a position as an associate with King & Spalding. King & Spalding is a large At-

> [t]hat some white male associates at King & Spalding have also been forced to leave the firm when they did not make partner under the firm's 'up-or-out' policy is beside the point. Petitioner's male contemporaries did not lose their jobs as associates of King & Spalding because they were males, but for other reasons not covered by Title VII.

Petitioner's Brief at 48.

Petitioner's argument is precisely the same as that rejected by this Court in *Delaware State College v. Ricks*, 449 U.S. 250. *Ricks* holds that it is the unlawful act and not the "delayed, but inevitable consequence" of the unlawful act that is actionable. *Id.* at 257-58; *accord Chardon v. Fernandez*, 454 U.S. at 8.

The only actionable act alleged by Petitioner is the partnership decision in May 1978. Because of King & Spalding's up-or-out policy, the "delayed, but inevitable consequence" of not inviting Petitioner to become a part-

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lanta law firm which operates as a general partnership. The partnership consists of approximately fifty active lawyers and employs approximately fifty additional lawyers as associates. At the time the plaintiff became an associate with the firm, consideration for partnership occurred at the end of an associate's sixth year. The firm also maintained an "up or out" policy. Under the policy, if the partnership did not invite an associate to become a partner after the requisite time, the associate was allowed to remain with the firm only for such reasonable period as necessary to secure other employment.

"In May 1978, the partnership considered Ms. Hishon, along with other associates hired at the same time, and decided not to invite her to join the partnership. She was promptly notified, and was extended the normal period of time to secure other employment. Eight months later, Ms. Hishon requested reconsideration for partnership. At the conclusion of the May 1979 partnership meeting, the result was the same—Ms. Hishon was not invited into the partnership. Again the partnership notified her of the outcome. Ms. Hishon left the firm on December 31, 1979."

Petition for En Banc Consideration at 2-3, *Hishon v. King & Spalding*, 678 F.2d 1022 (emphasis added) (quoting *id.* at 1024).

ner was that Petitioner be required to leave the firm after "such reasonable period as necessary to secure other employment." *Hishon v. King & Spalding*, 678 F.2d at 1024.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the court of appeals or dismiss the writ of certiorari as improvidently granted.

Respectfully submitted,

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Dated: August 8, 1983

CAVEAT:

THE FOLLOWING MOTION OF PETITIONER TO FILE A REPLY BRIEF OUT-OF-TIME WAS DENIED BY THE COURT ON NOVEMBER 7, 1983 (52 L.W. 3369), BUT IS REPRODUCED HEREIN IN THE INTEREST OF COMPLETENESS.

MOTION FILED
OCT 28 1983

CASE NO 82-940

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ELIZABETH ANDERSON HISHON,

Petitioner,

vs.

KING & SPALDING

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

MOTION OF PETITIONER TO FILE REPLY BRIEF OF PETITIONER

Elizabeth Anderson Hishon, the petitioner in the above-styled action, respectfully moves the Supreme Court for leave to file the Reply Brief of Petitioner, 40 copies of which have been lodged with the Clerk of the Supreme Court.

In support of this motion, the petitioner respectfully shows the Court the following:

1.

Oral argument in this action is scheduled for October 31, 1983.

2.

On October 24, 1983, Cockle Printing Company of Omaha, Nebraska, deposited 40 copies of the Reply Brief of Petitioner in a United States post office, with first-class postage,

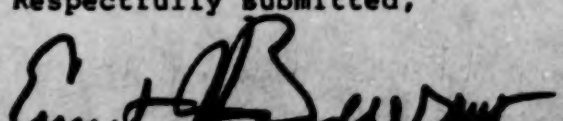
prepaid, and properly addressed to the Clerk of the Supreme Court. A true and correct copy of the Certificate of Service of Cockle Printing Company is attached hereto as Exhibit "A." On the same date, the undersigned, a member of the Bar of the Supreme Court, executed an Affidavit certifying that to the best of his knowledge Cockle Printing Company had mailed 40 copies of the Reply Brief of Petitioner on October 24, 1983. A true and correct copy of the Affidavit is attached hereto as Exhibit "B."

3.

On October 26, 1983, Ms. June Hoffman of the Clerk's office informed the undersigned that 40 copies of the Reply Brief of Petitioner had been received on that date and had been lodged with the Court. Ms. Hoffman further informed the undersigned that the 40 copies of the Reply Brief of Petitioner could not be accepted for filing without leave of Court.

WHEREFORE, the petitioner respectfully prays that her motion for leave to file the Reply Brief of Petitioner be granted.

Respectfully submitted,



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I, Linda Chloupek , of lawful age, being duly sworn, upon my oath state that I did, on the 24 day of October , 1983 , place in the U.S. Post Office at Omaha, NE 2 package containing 3 printed copies of Reply Brief of Petitioner in the following case:

No. #82-940
Elizabeth Anderson Hishon, Petitioner,
vs.
King & Spalding, Respondent.

that the proper postage was affixed to said envelope(s) and that they were plainly addressed to the following:

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Linda Chloupek
Affiant

Subscribed and sworn to before me this 24 day of October 19 83
I am duly authorized under the laws of the State of Nebraska to admin ister oaths.

GENERAL NOTARY State of Nebraska
PATRICIA L. HILLCOTT
My Comm. Exp. Nov. 24, 1984

Patricia L Hillcott
Notary Public

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EXHIBIT A

CASE NO. 82-940

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ELIZABETH ANDERSON HISHON,

Petitioner,

vs.

KING & SPALDING

Respondent.

A F F I D A V I T

STATE OF GEORGIA:
:
COUNTY OF FULTON:

I, EMMET J. BONDURANT, being first duly sworn on oath, depose and state that I am a member of the Bar of the United States Supreme Court and that on the 24th day of October, 1983, Cockle Printing Company filed the Reply Brief of Petitioner for the above-referenced case within the time limits permitted by the Supreme Court Rules by mailing the original and appropriate copies of the same by U.S. Mail, postage prepaid.

EMMET J. BONDURANT

Sworn to and subscribed
before me this 24th day
of October, 1983.

NOTARY PUBLIC
Notary Public, Georgia, State at Large
My Commission Expires Sept. 7, 1986

[NOTARIAL SEAL]

EXHIBIT B

CERTIFICATE OF SERVICE

I, Emmet J. Bondurant, do hereby certify that I have this day served the within and foregoing Affidavitby mailing copies thereof to counsel of record in envelopes properly stamped and addressed as follows:

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This 24th day of October, 1983.

Emmet J. Bondurant

CERTIFICATE OF SERVICE

I, Emmet J. Bondurant, do hereby certify that I have this day served counsel of record for the foregoing matter with a copy of the within Motion of Petitioner to File Reply Brief of Petitioner by depositing a copy of same in the United States mail in a properly addressed envelope with adequate postage thereon to:

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This 27th day of October, 1983.

EMMET J. BONDURANT

No. 82-940

In The
Supreme Court of the United States
October Term, 1983

ELIZABETH ANDERSON HISHON,

Petitioner,

vs.

KING & SPALDING,

Respondent.

On Certiorari To The
United States Court of Appeals
For the Eleventh Circuit

REPLY BRIEF OF PETITIONER

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First Amendment, U. S. Constitution 4, 5, 6, 7

No. 82-940

In The
Supreme Court of the United States
October Term, 1983

ELIZABETH ANDERSON HISHON,

Petitioner,

vs.

KING & SPALDING,

Respondent.

On Certiorari To The United States Court of Appeals For the Eleventh Circuit

REPLY BRIEF OF PETITIONER

King & Spalding has made five basic arguments in support of its claim for exemption from Title VII's otherwise comprehensive ban on employment discrimination.[1]

[1] King & Spalding has made an additional sixth argument that *certiorari* should be dismissed as having been improvidently granted.

ARGUMENT

I.

Outlawing Employment Discrimination By Law Firms Will Not Destroy The Independence Of The Bar

King & Spalding's principal argument is that, because members of the private bar often function as "advocates" in representing clients against the government, "lawyers must be free from private and governmental pressures . . . to accept unacceptable [*i.e.*, women] lawyers as partners." *Respondent's Brief* at 6. To sustain Title VII jurisdiction over law firms, the argument continues, would subject law firms not only to the hazard of suits by former associates, but would also make law firms potentially liable for discrimination suits by the EEOC, which King & Spalding describes as "a politically appointed advocacy agency of the Government." *Id.* at 7. Such suits, King & Spalding argues, would "create the appearance of a conflict between defense of [the law firm's] clients and defense of [the firm] because the EEOC is [often] a party-plaintiff in actions against clients of [King & Spalding]." *Id.*

King & Spalding's argument is untenable. It is specious to argue that the professional competence or independence of the Bar depends upon an exemption of law firms and the legal profession from legislation prohibiting employment discrimination.[2] Lawyers and law firms

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[2]Although King & Spalding has not argued directly that sex, race, religion or national origin are bona fide occupational qualifications for the legal profession, King & Spalding subtly implies that the role of lawyers as "advocates" would be diminished, their ability to "defend the rights of American citi-

(Continued on next page)

are not and never have been above the law. Indeed, law firms already have been held subject to investigation and suit by the EEOC. *See, e. g., EEOC v. Rinella & Rinella,* 401 F. Supp. 175 (N. D. Ill. 1975).

Moreover, law firms no less than their clients have long been subject to investigation and enforcement actions by a large number of other government agencies. For example, partnerships, including law partnerships, are required to file federal partnership tax returns. I.R.C. § 6031 (1983). Partnership records, as well as those of individual partners, are also subject to being audited and subpoenaed by the IRS. *See, e.g., Bellis v. United States,* 417 U. S. 85 (1974). It cannot be seriously argued that requiring members of the tax bar to file federal tax returns and subjecting them to IRS audits creates a conflict of interest or makes it impossible for the entire tax bar to represent clients in tax cases in a fearless, independent, professional manner. Law firms have also been subjected to enforcement actions by other agencies of the Executive Department, with whom they regularly litigate on behalf of clients, including the SEC [*Securities & Exchange Commission v. National Student Marketing Corp.,* 538 F. 2d 404 (D.C. Cir. 1976), *cert. denied,* 429 U. S. 1073 (1977)], the NLRB [*Kleinberg, Kaplan, Woolff, Cohen & Burrows, P.C.,* 253 N.L.R.B. 450 (1980); *Stroock & Stroock & Lavan,* 253 N.L.R.B. 447 (1980); *Foley, Hoag & Eliot,* 229 N.L.R.B. 456 (1977); *Wayne County Neighborhood Legal Services, Inc.,* 229 N.L.R.B. 1023 (1977)],

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zens" would suffer, and the professional standards of private law firms would be degraded, if law firms were forced "to accept unacceptable [*i. e.,* women, black and Jewish] lawyers as partners." *Respondent's Brief* at 6.

and the Antitrust Division of the Justice Department [*United States v. Buzzard*, 540 F. 2d 1383 (10th Cir. 1976), *cert. denied*, 429 U. S. 1072 (1977); *United States v. Allen County Indiana Bar Association, Inc.*, No. F 79-0042 (N.D. Ind. Oct. 7, 1980) (consent decree)]. There is no evidence that the fact that lawyers may be subject to investigation by any of those agencies has made the Bar subservient or timid or has otherwise impaired the independence of lawyers to function as vigorous advocates before or against the same agencies.

II.

King & Spalding Has No First Amendment Right To Discriminate In The Selection Of Partners Or To Be Free From Involuntary Association With Women Or Minorities In The Practice Of Law

King & Spalding argues, apparently seriously, that it has both a First Amendment and due process right of "freedom of association [that] necessarily includes the right to select" the lawyers who will be admitted to partnership and thus permitted to "constitute the associational group." *Respondent's Brief* at 17. In essence, King & Spalding is claiming that the male partners have a constitutional right not to associate with women in the practice of law, and that Title VII is, therefore, unconstitutional as applied to King & Spalding's partnership decisions.

The First Amendment, however, protects the right of freedom of association only to the extent of guaranteeing the right of persons to join together "to pursue goals independently protected by the first amendment,"[3]

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[3] L. Tribe, *American Constitutional Law* § 12-23, at 702 (1978).

and does not include the right to prevent others from sharing in educational or job opportunities. The First Amendment protects the right of association for the purpose of engaging in political speech [*Branti v. Finkel*, 445 U. S. 507 (1980)], political advocacy [*Cousins v. Wigoda*, 419 U. S. 477 (1975)], and religious worship [*Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U. S. 696 (1976)]. *See also Buckley v. Valeo*, 424 U. S. 1 (1976) (political speech); *NAACP v. Alabama ex rel. Patterson*, 357 U. S. 449, 460 (1958) ("association for the advancement of beliefs and ideas"); *Sweezy v. New Hampshire*, 354 U. S. 234 (1957) (political expression). *Compare Garcia v. Texas State Board of Medical Examiners*, 384 F. Supp. 434 (W. D. Tex. 1974), *aff'd mem.*, 421 U. S. 995 (1975) (summarily affirming a decision that rejected a claim by consumers that they had a "freedom of association" right to form a consumer-controlled pre-paid health plan organization).

The right of freedom of association cannot be used to shield acts of invidious discrimination from being outlawed by Title VII or other antidiscrimination legislation. White children do not have a constitutional "right" to be free from association with black children in public schools. Protestant workers do not have a constitutional "right" to be free from association with Catholics or Jews in the workplace. And male lawyers who hold the dominant positions as partners in the Nation's most prestigious law firms do not have a constitutional right arbitrarily to exclude equally well-qualified lawyers who happen to be women from partnership because the existing partners would be "more comfortable" practicing law with men.

In *Runyon v. McCrary*, 427 U. S. 160 (1976), this Court rejected similar freedom of association claims that were asserted on behalf of white children in private schools. Rejecting the contention that any right of freedom of association would be violated if black children were allowed to attend the same schools, the Court stated:

> In *NAACP v. Alabama*, 357 U. S. 449, and similar decisions, the Court has recognized a First Amendment right "to engage in association for the advancement of beliefs and ideas . . . ." *Id.*, at 460. That right is protected because it promotes and may well be essential to the "[e]ffective advocacy of both public and private points of view, particularly controversial ones" that the First Amendment is designed to foster. *Ibid.* See *Buckley v. Valeo*, 424 U. S. 1, 15; *NAACP v. Button*, 371 U. S. 415.
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> From this principle it may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions. But it does not follow that the *practice* of excluding racial minorities from such institutions is also protected by the same principle. As the Court stated in *Norwood v. Harrison*, 413 U. S. 455, *"the Constitution . . . places no value on discrimination," id.*, at 469, *and while "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . it has never been accorded affirmative constitutional protections.* And even some private discrimination is subject to special remedial legislation in certain circumstances under § 2 of the Thirteenth Amendment; Congress has made such discrimination unlawful in other significant contexts." *Id.*, at 470. In any event, as the Court of Appeals noted, "there is no showing that discontinuance of [the] discriminatory admission practices would inhibit in any way

the teaching in these schools of any idea or dogma." 515 F. 2d, at 1087.

Id. at 175-76 (emphasis supplied).

See, e. g., United States v. International Longshoremen's Association, 460 F. 2d 497, 501 (4th Cir.), *cert. denied,* 409 U. S. 1007 (1972) (rejecting "freedom of association" as a defense for segregated locals based on the workers' alleged rights to freedom of association); *United States v. Jacksonville Terminal Co.,* 451 F. 2d 418, 457 (5th Cir. 1971), *cert. denied,* 406 U. S. 906 (1972) (ordering the consolidation of segregated locals because "locals are not mere 'social clubs'"); *Lucido v. Cravath, Swaine & Moore,* 425 F. Supp. 123, 129 (S. D. N. Y. 1977) ("[T]he court does not recognize any First Amendment privacy or associational rights for a commercial, profit-making business organization of the nature of the Cravath partnership.").

III.

Employment Discrimination By Law Firms Will Not Be Remedied By Father-Daughter Relationships

King & Spalding accuses petitioner of relying on "inaccurate stereotypes [and] inaccurately assum[ing] that discrimination against women lawyers is widespread...." *Respondent's Brief* at 8. King & Spalding points to the fact that an increasing number of partner-fathers have daughters who have become lawyers and that such fathers would not tolerate discrimination against women by their law firms. *Id.* at 37. King & Spalding also claims that the economic self-interest of law firms will cure any remaining problems of discrimination in the legal profession. *Id.* at 35-37.

Even if one accepts the premise that those partners in large law firms who have daughters who are either attending law school or are admitted to the Bar will not support discrimination against their children, such nepotism is hardly a reason for exempting law firms from Title VII. A much larger number of other partners in law firms will not be similarly constrained from discriminating against women; nor will paternalism help blacks, Jews and other minorities, whose fathers are not partners in the major law firms, gain access to employment opportunities in the private bar.[4]

Moreover, the statistics cited by King & Spalding (*Respondent's Brief* at 33 n. 52) demonstrate that female associates are far less likely to make partner than male associates, despite the increasing numbers of women graduating from law schools and entering the private practice. While statistics cited by King & Spalding show that the *percentage increases* in the number of female partners

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[4]King & Spalding acknowledges that "minority law school graduates are less likely than their non-minority counterparts to enter private practice and [that] a number of large firms have no black or Hispanic attorneys . . ." *Respondent's Brief* at 35. The respondent fails, however, to explain why higher percentages of minority lawyers are forced to enter government service than their non-minority classmates. The reasons are obvious. Women and minority lawyers enter government employment in greater percentages than their male and non-minority counterparts because of employment discrimination by law firms. (*See, e.g.*, Curran, *The Legal Profession in the 1980's: The Changing Profile of the Legal Profession* 13 (1982) (paper presented by the Associate Executive Director of the American Bar Foundation at ABA 1983 Annual Meeting) (Among new entrants between 1975 and 1980, 57% of women were in private practice as compared to 72% of men). For many minority lawyers, government service or legal aid programs are the only job opportunities available.

have been greater than the percentage increases in the total number of partners in the 50 largest law firms surveyed by the National Law Journal, the same statistics reflect that over a three-year period, nine males became partners for every female who became a partner.

While King & Spalding argues that the economic self-interest of law firms will be a sufficient guarantee that the major firms will not discriminate against women and other minorities (*Respondent's Brief* at 36-38), history teaches an opposite lesson. Discrimination against women, blacks, and religious minorities is rooted in bigotry, not economics, and cannot be defended on the basis of logic or enlightened self-interest. Racial, religious, and sexual discrimination has always been economically counterproductive, not only for the victims, but also for the most ardent practitioners. For example, it was economically counterproductive for the owners of the Heart of Atlanta Motel to maintain vacant rooms rather than to admit blacks. They, however, stubbornly spent thousands of dollars in defense of their "right" to discriminate against blacks even though that discrimination was both illegal and contrary to their economic self-interest. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

In the final analysis, Congress, and not the Court, is the judge of whether economic self-interest or moral suasion is a sufficient deterrent to employment discrimination. Congress enacted the 1964 Civil Rights Act precisely *because* it determined that racial, religious, and sexual prejudice was deeply rooted, and that strong legislation, not economic incentives, was required if discrimination in public accommodations and employment was to end.

IV.

The Legislative History Of Title VII Supports Coverage Of Partnership Decisions Of Law Firms

King & Spalding argues that, because the legislative history of the 1964 Civil Rights Act does not reflect explicit consideration by Congress of the precise issue of discrimination by law firms in the selection of partners, the Court should presume that Congress intended to exclude partnership decisions of law firms from the coverage of Title VII.

King & Spalding's argument runs counter to the admonition in *County of Washington v. Gunter*, 452 U. S. 161, 178 (1981), that courts "must . . . avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate." King & Spalding's argument is also flawed for a number of other reasons.

First, Congress did not, as King & Spalding's argument implies, overlook partnerships in defining the coverage of Title VII. To the contrary, Congress treated partnerships and corporations equally and included both within the definition of a "person" who would be considered an "employer" covered by Title VII. § 701(a)(b), 42 U.S. C. § 2000e(a),(b). Moreover, when Congress decided to exempt a particular organization or activity from Title VII, it did so, not by implication, but by express exclusions in the Act.

Second, it is true, as King & Spalding points out in its brief, that one Senator (Norris Cotton of New Hampshire) equated the employment of workers by businesses

with fewer than 100 employees with the selection of a partner. *Respondent's Brief* at 49-50. From the remarks of a single Senator in support of an unsuccessful amendment to Title VII, King & Spalding leaps to the conclusion that everyone in Congress must have agreed with Senator Cotton that the selection of a partner was outside the coverage of Title VII. *Id.* King & Spalding, however, ignores the fact that Senator Cotton was arguing in favor of a proposal that would have restricted the coverage of Title VII to firms with 100 or more employees. His proposal was rejected by Congress, which adopted a much smaller (initially 25 or more employees) threshold for Title coverage.[5]

Third, King & Spalding makes much of the fact that lawyers comprised a majority of the members of Congress which enacted the 1964 Civil Rights Act. *Respondent's Brief* at 46-48. The firm argues that, "because a majority of the members of Congress were lawyers, their silence cannot be construed as reflecting an intention to include invitations to law partnerships within the scope of Title VII." *Id.* at 48. The firm asserts that the lawyers in Congress must have assumed that partnership decisions were so clearly outside the coverage of the Act that no discussion of the issue was necessary. *Id.*

To accept this argument, one would have to believe that a majority of the members of the Congress were

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[5]One could also conclude that a majority of Congress agreed with Senator Cotton that the selection of an employee in a small business of less than 100 " 'comes very close to selecting a partner' " (*Respondent's Brief* at 49), but concluded that these similarities were not a sufficient reason for exempting businesses with more than 25 (now 15) workers — however classified — from the coverage of Title VII.

hypocrites — that while Congress was publicly proclaiming its intention to "prohibit all practices in whatever form which create inequality of employment opportunity . . . [as] the 'highest priority' " [*Franks v. Bowman Transportation Co.*, 424 U. S. 747, 763 (1976)], and to "require[] 'the removal of artificial, arbitrary and unnecessary barriers to employment' and professional development that had historically been encountered by women and blacks as well as other minorities" [*Connecticut v. Teal*, 457 U. S. 440, 447 (1982)] — the lawyer members of Congress were silently carving out from Title VII's otherwise comprehensive prohibitions a special exemption for law firms which would allow them in their private law practices to commit the very acts of employment discrimination that they vocally condemned in all other businesses.[6]

Fourth, equally farfetched is the contention that the Congress which enacted the 1964 Act relied on the fact that the Court had "implied" that the practice of a learned profession is not "trade or commerce" [citing *Goldfarb v. Virginia State Bar*, 421 U. S. 773, 786 n. 15 (1975)], and that Congress also relied on a snippet from Justice Holmes' 1922 opinion in *Federal Baseball* [*Federal Baseball Club of Baltimore, Inc. v. National League*, 259 U. S. 200, 209 (1922)], in which he argued that a law

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[6]King & Spalding also ignores the fact that Title VII has a specific exemption for the United States, including Congress. 42 U. S. C. § 2000e(b). If one were to accept King & Spalding's argument that lawyers in Congress successfully exempted their private law practices from Title VII, notwithstanding the absence of any evidence of congressional intent to do so, then a specific exemption for Congress itself also should have been unnecessary.

firm is not engaged in interstate commerce merely because a lawyer goes to another state to argue a case. *Respondent's Brief* at 52.[7]

The notion that the practice of a learned profession was not subject to regulation by Congress under the commerce clause had, however, been laid to rest before 1964. *United States v. Oregon State Medical Society*, 343 U. S. 326 (1952); *Goldfarb v. Virginia State Bar, supra.* Likewise, the Court's restrictive view of interstate commerce in *Federal Baseball* was an anachronism that had been repudiated in *United States v. South-Eastern Underwriters Association*, 322 U. S. 533 (1944), and *Wickard v. Filburn*, 317 U. S. 111 (1942), and effectively overruled in *Radovich v. National Baseball League*, 352 U. S. 445 (1957), as applied to all sports except baseball. *See Flood v. Kuhn*, 407 U. S. 258 (1972).

Fifth, in her opening brief, petitioner argued, based on *NLRB v. Hearst Publications*, 322 U. S. 111 (1944), *United States v. Silk*, 331 U. S. 704 (1947), and *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U. S. 28 (1961), that the definitions of the terms "person," "employer" and "employee" in Title VII were similar to the original definitions of the same terms in the National Labor Relations Act [*Hearst*], the Social Security Act [*Silk*], and the Fair Labor Standards Act [*Goldberg*], and that Congress can be presumed to have been aware that in these cases this Court rejected narrow common-law definitions of the term "employee" in the earlier acts in favor of an

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[7] It is doubtful that even Justice Holmes would have ruled that a law firm such as King & Spalding, that has offices in Atlanta and Washington, was not engaged in interstate commerce.

economic reality test of employment. *Petitioner's Brief* at 28-29.

King & Spalding responded to this argument by correctly noting that, after the decisions in *Hearst Publications* and *Silk*, Congress had amended the applicable statutes to overrule the Court's expansive interpretation of the term "employment." King & Spalding's argument proves too much. In drafting the definitions of Title VII, Congress had several choices. Congress could have adopted the definitions of the original NLRA or SSA — knowing that those definitions had been given very broad interpretations by the Court under an economic reality test. Alternatively, Congress could have taken the opposite course and adopted the more narrow common-law concept of the term "employment" which Congress had enacted to overrule *Hearst Publications* and *Silk*. It is not without significance, therefore, that Congress chose the former course, and utilized essentially the same general definitions of "employment" that it had used in the initial versions of the earlier Acts, rather than the more restrictive language of the later amendments.

V.

EEOC Form 100 Does Not Support Respondent's Position

King & Spalding makes the misleading claim that "since 1966, the EEOC has interpreted Title VII to exclude partners from the definition of 'employee'....[T]he EEOC has said that an employee is 'any individual on the payroll of an employer who is an employer for purposes of the employer's withholding of Social Security taxes.'" *Respondent's Brief* at 57-58 (citing EEOC Standard Form 100).

EEOC Standard Form 100 is an "Employer Information Report" that was used by the EEOC and the U. S. Department of Labor Contract compliance programs to survey a select group of employers with more than 100 employees (and their affiliates). The definition of "employee" in the Form 100[8] does not purport to be an administrative interpretation of the term "employee" in § 701 of Title VII. Form 100 *excludes* a number of categories of workers who are undoubtedly "employees" for Title VII purposes. For example, Form 100 excludes "persons at a construction site whose employment relationship is expected to terminate with the end of the employee's work at the site, and persons temporarily employed in any industry . . . such as mariners, stevedores,

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[8] "Employee" means any individual on the payroll of an employer who is an employee for purposes of the employer's withholding of Social Security taxes except insurance salesmen who are considered to be employees for such purposes solely because of the provisions of Section 3121(d) (3)(B) of the Internal Revenue Code. The term "employee" SHALL NOT include persons who are hired on a casual basis for a specified time, or for the duration of a specified job, and work on remote or scattered sites or locations where it is not practical or feasible for the employer to make a visual survey of the work force within the report period; for example, persons at a construction site whose employment relationship is expected to terminate with the end of the employee's work at the site; persons temporarily employed in any industry other than construction, such as mariners, stevedores, waiters/waitresses, movie extras, agricultural laborers, lumber yard workers, etc. who are obtained through a hiring hall or other referral arrangement through an employee contractor or agent, or by some individual hiring arrangement; or persons on the payroll of a temporary service agency who are referred by such agency for work to be performed on the premises of another employer under that employer's direction and control."

1 Empl. Prac. Guide (CCH) ¶ 1881, at 1320-21.

waiters, waitresses . . . lumber yard workers. . . ." The definition in Form 100 is nothing more than a quick and simple guide to be used by employers in determining whether they are required to complete the form. Such a rule of thumb cannot be used to narrow the coverage of Title VII.[9]

VI.

The Timeliness Of Petitioner's Charge To The EEOC Turns On Disputed Issues Of Fact That Were Deferred By The Lower Court

Finally, King & Spalding argues that *certiorari* should be dismissed because "the record conclusively shows the Petitioner failed to comply with Title VII's 180-day limitations. . . ." *Respondent's Brief* at 70-73.

The short answer to the Respondent's argument is that the statute of limitations defense is not properly before the Court. The district court dismissed the complaint for failure to state a claim under Title VII.[10] Motion and

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[9]King & Spalding also cited Legal Interpretations of the EEOC's General Counsel, seemingly in support of its argument that the EEOC interpreted Title VII to exclude partners from the definition of employees. *Respondent's Brief* at 59-60. Although these Legal Interpretations merely state that "whether partners of the firm are 'employees' within the meaning of Title VII must be determined on a case-by-case basis" [EEOC, First Annual Digest of Legal Interpretations, July 1965-July 1966, § I(B)(5), at 6], King & Spalding failed to note that the Legal Interpretations "neither met nor were intended to meet the standards required of a 'written interpretation or opinion of the Commission' within the meaning of the Commission's procedural regulations" [29 C.F.R. §§ 1601.31-1601.33 (1980)], or of § 713(b) of Title VII, 42 U. S. C. § 2000e-12(b). 35 Fed. Reg. 18,692 (1970).

[10]The district court mischaracterized its ruling as a dismissal for want of "subject matter jurisdiction." *See Romero*

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affirmative defenses, including specifically King & Spalding's plea that the complaint was untimely, were deferred by the district court, with the consent of the parties, pending a ruling on the threshold issue of coverage under Title VII. Order of April 24, 1980; J. A. 86-87; *Hishon v. King & Spalding*, 678 F. 2d 1022, 1024 n. 3 (11th Cir. 1982).

Moreover, resolution of the 180-day defense involves disputed issues of fact. Mrs. Hishon filed a complaint with the EEOC on November 19, 1979. *Respondent's Brief* at 1. This was within 180 days after Mrs. Hishon was notified that she had been rejected for partnership by King & Spalding at its annual meeting in May 1979. King & Spalding argues, however, that it had also rejected her for partnership a year earlier, and that the firm merely "failed to reconsider" its decision in May 1979. It is common for law firms, including King & Spalding, to consider associates for partnership in successive years after the completion of minimum periods of employment (usually five to seven years). Some associates who are rejected for partnership at the end of their fifth year make partner the following year. Thus, the fact that an associate is "passed over" for partnership one year does not mean that the initial decision of the firm is final, or that the associate will not become a partner in the firm in a later year.

Multiple decisions by a law firm to reject an associate for partnership based on sex in successive years are separate acts of discrimination—a result that is not changed

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v. International Terminal Operating Co., 358 U. S. 354, 359 (1959) (" 'As frequently happens where jurisdiction depends on subject matter, the question of whether jurisdiction exists has been confused with the question whether the complaint states a cause of action.' " (quoting *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U. S. 246, 249 (1951)).

by claiming that the later decision is not a new act of discrimination, but merely a "failure to reconsider" an earlier discriminatory rejection. *See Griffin v. Big Spring Independent School District*, 706 F. 2d 645, 649 (5th Cir. 1983). Such decisions are not analogous to the grievance procedures referred to by Mr. Justice Powell in *dictum* in *Delaware State College v. Ricks*, 449 U.S. 250, 261 (1980).

CONCLUSION

King & Spalding has requested this Court to carve out from the coverage of Title VII a special exemption for lawyers and law firms, thereby allowing them to discriminate freely and arbitrarily in the decisions concerning advancement to the most lucrative positions in the legal profession. Its argument is not supported either by the legislative history of Title VII or prior decisions of this Court, and should be rejected.

As discussed above and in the petitioner's opening brief, the complaint stated a claim for sex discrimination. Therefore, the dismissal of the complaint for failure to state a claim was erroneous and should be reversed.

Respectfully submitted,

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MOTION FOR LEAVE TO FILE AND BRIEF OF Robert Abrams, Michael A. Bamberger, James E. Daniels, Lloyd Frank, Victor A. Kovner, Elliot C. Lichtman, Thomas H. Moreland, Maurice N. Nessen, Francis T.P. Plimpton, Norman Redlich, Martin F. Richman, Albert J. Rosenthal, Shirley Adelson Siegel, John Silard, Michael H. Simonson, Edith I. Spivack, David G. Trager, George Zeitlin, Council of New York Law Associates and the State of New York Division of Human Rights AS AMICI CURIAE IN SUPPORT OF THE PETITIONER AND BRIEF ATTACHED

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On Writ of Certiorari To The

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For The Eleventh Circuit

MOTION FOR LEAVE TO

FILE BRIEF AMICI CURIAE

The 18 named attorneys, who are prominent government officials, law school deans and law firm partners, join with the New York State Division of Human Rights and with the Counsel of New York Law Associates respectfully to move this Court for leave to file the accompanying brief Amici Curiae in support of petitioner Elizabeth Anderson Hishon. Together with Ms. Hishon, we ask this Court to reverse the decision of the Eleventh Circuit holding that Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000 et seq. is inapplicable to promotion to partnership within private law firms.

Consent to file the attached brief has been sought from the parties; while counsel for Ms. Hishon have consented, counsel for respondent has not approved the filing as to all parties to this brief. We therefore request permission of this Court pursuant to Rule 36.

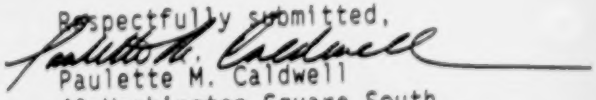
The Interest of the Amici

The Amici are 18 individuals, one organization concerned with equality of opportunity for women and for racial, religious and ethnic minorities in the practice of law, and the nation's oldest state fair employment agency. One individual is the Attorney General of the State of New York. As such he is in charge of all legal business in which the state has an interest, including the enforcement of New York's laws against discrimination in employment. Three of the individual Amici are deans of major law schools whose students and alumni are affected by discrimination in the practice of their profession. Twelve are partners or principals at nine major law firms in New York City and Washington, D.C., most of which may be affected by the decision in this case. One is a former Solicitor General of the State of New York, and another is a high-level municipal attorney. The Council of New York Law

Associates is an organization of junior-level attorneys who hope eventually to be considered for law firm partnership on a nondiscriminatory basis.

The Amici are either themselves attorneys, an organization of attorneys, or a state agency dealing with employment discrimination. As such, Amici have a particular and compelling interest in the special facts of this case. The Amici believe that Title VII of the Civil Rights Act of 1964 is a crucial protection for minorities and women and wish to share with the Court their view of the proper interpretation of the statute as applied to employees of partnerships.

Respectfully submitted,



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United States Court Of Appeal
For The Eleventh Circuit

BRIEF OF ROBERT ABRAMS, MICHAEL A. BAMBERGER, JAMES E. DANIELS, LLOYD FRANK, VICTOR A. KOVNER, ELLIOT C. LICHTMAN, THOMAS H. MORELAND, MAURICE N. NESSEN, FRANCIS T. P. PLIMPTON, NORMAN REDLICH, MARTIN F. RICHMAN, ALBERT J. ROSENTHAL SHIRLEY ADELSON SIEGEL, JOHN SILARD, MICHAEL H. SIMONSON, EDITH I. SPIVACK, DAVID G. TRAGER, GEORGE ZEITLIN, COUNCIL OF NEW YORK LAW ASSOCIATES AND THE STATE OF NEW YORK DIVISION OF HUMAN RIGHTS AMICI CURIAE IN SUPPORT OF THE PETITIONER

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The Interest of the Amici

The Amici are 18 individuals, one organization concerned with equality of opportunity for women and for racial, religious and ethnic minorities in the practice of law, and the nation's oldest state fair employment agency. One individual is the Attorney General of the State of New York. As such he is in charge of all legal business in which the state has an interest, including the enforcement of New York's laws against discrimination in employment. Three of the individual Amici are deans of major law schools whose students and alumni are affected by discrimination in the practice of their profession. Twelve are partners or principals at nine major law firms in New York City and Washington, D.C., most of which may be affected by the decision in this case. One is a former Solicitor General of the State of New York, and another is a high-level municipal attorney. The Council of New York Law

Associates is an organization of junior-level attorneys who hope eventually to be considered for law firm partnership on a nondiscriminatory basis.

The Amici are either themselves attorneys, an organization of attorneys, or a state agency dealing with employment discrimination. As such, Amici have a particular and compelling interest in the special facts of this case. The Amici believe that Title VII of the Civil Rights Act of 1964 is a crucial protection for minorities and women and wish to share with the Court their view of the proper interpretation of the statute as applied to employees of partnerships.

STATEMENT OF THE CASE

This case presents for decision one straightforward, and important, question of statutory interpretation: are decisions concerning promotion to partnerships and discharge of associates in large law firms exempt from the prohibitions of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e et seq. ("Title VII")?

Petitioner Elizabeth Anderson Hishon was employed as an associate by the law firm of King & Spalding from 1972 until her discharge in 1979. By that time, King & Spalding was comprised of more than 100 attorneys-- approximately half of whom were partners-- and more than 50 other employees who were not attorneys. (Complaint, Answer ¶¶2(b)). In 1979, Ms. Hishon, who was only the second woman employed as an attorney in the 100-year

existence of the firm,* was denied partnership, and discharged pursuant to the firm's "up or out" policy. She then filed suit under Title VII charging discrimination on the basis of sex.

The District Court for the Northern District of Georgia dismissed the complaint for lack of subject-matter jurisdiction. Rule 12(b)(1), Fed. R. Civ. P. With scarcely a nod toward the language or legislative history of Title VII, the Court ruled that decisions whether to promote a law associate to partnership are protected by the same associational rights which protect decisions concerning marriage, and that those associational rights, as a matter of law, defeated any claims petitioner could raise under Title VII. As the District Court put it:

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* A woman was hired in 1944 to serve as a permanent associate. She remained with the firm until 1977. (Brief of Petitioner in Application for Writ of Certiorari at 4).

> "To use or apply Title VII to coerce a mismatched or unwanted partnership too closely resembles a statute for the enforcement of shotgun weddings." 25 Empl. Prac. Dec. (CCH) ¶ 31,703 at 23,062 (N.D. Ga. 1980).

The Court of Appeals for the Eleventh Circuit affirmed, over the dissent of Circuit Judge Tjoflat. 678 F. 2d 1022 (11th Cir. 1982) Evincing the same concern for King & Spalding's rights of "voluntary association", the majority construed Title VII quite narrowly. It held that promotion to partnership was not a "term, condition or privilege of employment" protected by section 703(a)(1) or an "employment opportunity" protected by section 703(a)(2). Moreover, the Court held, application of King & Spalding's "up or out" policy, which resulted in Ms. Hishon's discharge, was exempt from the discharge provisions of Title VII.

SUMMARY OF THE ARGUMENT

The Eleventh Circuit majority's decision should be reversed. It conflicts with the language and intent of Congress in enacting Title VII, especially because Congress explicitly included partnerships in its definition of employers, and did not create or intend any exemption for promotion or discharge decisions of law partnerships. Congress drafted a broad statute in Title VII, and the courts have construed its coverage liberally.

To affirm the decision below would have a substantial and far-reaching deleterious effect-- plainly unintended by Congress-- because it carves out a substantial and unwarranted exemption from Title VII for partnerships which fill at least some partnership positions by promoting associates from within the firm. Since the partnership form is used by many business entities -- not simply law firms -- and

these entities also choose partners from among their employees, the logic of the majority's decision could deny the protections of Title VII to employees in a great many businesses.

In addition, the decision below relies on a mistaken view of the associational rights of partnerships like King & Spalding, and incorrectly balances those rights against the provisions of Title VII.

POINT I

THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH THE CONGRESSIONAL MANDATE AND WITH THE ONLY OTHER COURT DECISION ON POINT

A. The Eleventh Circuit's decision conflicts with the Congressional mandate

Congress has prohibited partnerships from discriminating against minorities or women with respect to "terms, conditions, or privileges of employment," and "employment opportunities." 42 U.S.C. §2000e-2(a)(1), (2).* In a partnership like King & Spalding, which follows the practice of filling partnership positions by promoting associates from within the firm, a promotion to partnership is a "term, condition or privilege of employment" and an "employment

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* Under Title VII, "employers" may not discriminate. 42 U.S.C. §20003-2(a)(1). An "employer" is a "person engaged in an industry affecting commerce who has fifteen or more employees . . . ." 42 U.S.C. §2000e-2(a), (b). The term "person" includes "partnerships." 42 U.S.C. §2000e(a), (b).

opportunity" within the meaning of Title VII. In addition, in those partnerships which share with King & Spalding an "up or out" policy, the forced departure of an associate, after he or she fails to be promoted to partnership, is a discriminatory discharge also covered by the statute.

In adopting Title VII, Congress intended a broad remedial statute which would reach employment discrimination in all but its most insignificant manifestations. The statute banned "all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin." County of Washington v. Gunther, 452 U.S. 161, 178 (1981), quoting Franks v. Bowman Transportation Co., 424 U.S. 757, 763 (1976). Included are discriminatory promotion practices. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). This Court, in

keeping with the Congressional mandate, has construed Title VII broadly to achieve its remedial purpose.

The courts have uniformly held that Title VII prohibits discrimination in promotions not merely to rank and file but also to middle and upper echelon positions. See, e.g., Payne v. Travenol Labs, 673 F.2d 798 (5th Cir. 1982) (technical, managerial and executive level jobs); Lieberman v. Gant, 630 F.2d 60, 64 (2d Cir. 1980) (Friendly, J.) (promotion of faculty to tenure); Kunda v. Muhlenberg College, 621 F.2d 532 (3rd Cir. 1980) (tenure decisions); Gilmore v. Kansas City Terminal Railway Co., 509 F.2d 48, 51 (8th Cir. 1975) (managerial and supervisory positions); Pinckney v. County of Northampton, 512 F. Supp. 989 (E.D. Pa. 1981), aff'd, 681 F.2d 808 (3rd Cir. 1982) (executive positions); Ste. Marie v. Eastern Railway Ass'n, 458 F. Supp. 1147 (S.D.N.Y. 1978), rev'd on

other grounds, 650 F.2d 395 (2d Cir. 1981) (top management and executive positions); Hecht v. Cooperative for American Relief Everywhere, Inc., 351 F. Supp. 305 (S.D.N.Y. 1972) (executive positions). See also Bartholet, Application of Title VII to Jobs in High Places, 95 Harv. L. Rev. 945 (1982).

Congress made no distinction between professional and nonprofessional employment, making discriminatory practices in both illegal. Promotions in professional employment situations are plainly covered by Title VII.*

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* Congress' intent to include professional employment within the scope of Title VII is clear from the legislative history available. Senator Javits, in opposing an amendment that would have excluded hospital-employed physicians from Title VII coverage said:

> "One of the things that those discriminated against have resented the most is that they . . . cannot ascend the higher rungs in professional and other life.

(Footnote continued on following page)

Moreover, Congress could not have intended the substantial exemption from Title VII that the Eleventh Circuit's decision would create. After

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(Footnote continued from previous page)

> "Yet this amendment would . . . reinstate the possibility of discrimination on grounds of ethnic origin, color, sex, religion -- [among] physicians or surgeons, one of the highest rungs of the ladder that any member of a minority could attain -- and thus lock in and fortify the idea that being a doctor or surgeon is just too good for members of a minority . . . and the Federal law will not protect them." 188 Cong. Rec. 3802 (1972).

The amendment was defeated. See also EEOC v. Rinella & Rinella, 401 F. Supp. 175, 179-81 (N.D. Ill. 1975) ("[t]he courts . . . have found little distinction between professional and nonprofessional job situations, concluding that, since the primary objective of Title VII is the elimination of the major social ills of job discrimination, discriminatory practices in professional fields are not immune from attack"); Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123, 126 (S.D.N.Y. 1977) ("Congress clearly included in the objec- tives of Title VII the elimination of job discrimination in professional fields including law . . ."); Kohn v. Royall, Koegel & Wells, 59 F.R.D. 515, 521 (S.D.N.Y. 1973), app. dis., 496 F.2d 1094 (2d Cir. 1974).

all, the logic of the Eleventh Circuit would apply equally to small closely-held businesses in proprietorship or corporate form, where associational interests certainly are at least as compelling as the large law partnership. And the Eleventh Circuit's exemption would sweep even more broadly-- for an exception to Title VII for promotions to partnership in firms such as King & Spalding would not affect only law firms. Partnership is a common form of business organization, particularly for accounting firms, advertising agencies and brokerage houses. It is also used in industry, forestry, agriculture, fishing, mining, construction, manufacturing, transportation, public utilities, wholesale and retail trade, finance, insurance and real estate. The total number of partnerships in the United States is approximately 1,153,000. U.S. Bureau of the Census, Statistical Abstract of the United States: 1981 at 535, chart 899 (102d ed. 1981). As this Court aptly observed in

Bellis v. United States, 417 U.S. 85, 93 (1970), "[s]ome of the most powerful private institutions in the Nation are conducted in the partnership form."* Congress, which intended to write a broad, remedial statute-- aimed at major social and economic inequalities-- did not intend to allow such an expansive a gap in the coverage of Title VII.

In addition to the language and legislative history of Title VII, no logical distinction exists for excluding from Title VII coverage advancement to partner at a partnership like King & Spalding while including promotions to upper level jobs in corporations or universities. The possibility of promotion in a corpo-

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* Accounting firms are generally partnerships, the largest of which have even more partners than found in law firms. In 1981, the eight largest accounting partnerships had an aggregate of approximately 7,000 partners and total revenues of over $6 billion. See The Year of the Accountant, New York Times, Business Section (Jan. 3, 1982). One such firm, Coopers & Lybrand, today has over 900 partners in the United States and nearly 2,000 partners on an international basis.

ration or award of tenure in a university acts - as an inducement to attract talented individuals to accept the institution's offer of employment and to do well once they are there. Similarly, the possibility of advancement to partner attracts associates like Ms. Hishon to the firm and motivates them to work hard. According to the record in this case, Ms. Hishon and other associates were persuaded to accept employment by King & Spalding by the promise that they would be considered for partnership on a non-discriminatory basis after five or six years of employment. Complaint ¶ 8(b). See also Answer ¶ 8(b) (". . . all associates are employed with the expectation that they will be considered for . . . partnership . . . within a reasonable period of time . . .").*

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* While only the allegations in the complaint need be taken as true for the purpose of this appeal, see Conley v. Gibson, 355 U.S. 41 (1975), the promotion practices we address are admitted by King & Spalding, as we show in the text.

Associates' work at King & Spalding was evaluated annually in terms of their progress toward partnership. Complaint ¶ 8(c). See also Answer ¶8(c) (King & Spalding admits this). King & Spalding's practice was to promote associates who received appropriate evaluations to partner. Complaint ¶ 8(d). See also Answer ¶ 8(d) (King & Spalding admits that associates who "meet the firm's standards for partnership" are promoted). In addition, King & Spalding's practice was to require associates who were not promoted to partner to seek employment elsewhere. Answer ¶ 9. These practices make advancement to partner a promotion like any other promotion. Thus, advancement to partner is within the meaning of "terms, conditions and privileges of employment" and "employment opportunities," and is covered by Title VII. See Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123, 127-28 (S.D.N.Y. 1977). See also cases cited supra at 10. The Eleventh Circuit's decision to the contrary is clearly wrong.

B. The Eleventh Circuit's decision conflicts with the only other court decision on point

The only other reported Title VII decision involving promotion to partnership squarely contradicts the Eleventh Circuit's decision. Lucido v. Cravath, Swaine & Moore, supra. In Lucido, the Court held that promotion to partnership is a "term, condition or privilege of employment" and an "employment opportunity" within the meaning of Title VII. The Eleventh Circuit in Hishon conceded that Lucido was conflicting authority but expressly rejected its holding. 678 F.2d at 1029.

Lucido was more persuasively reasoned. In Lucido, the law firm argued that since Title VII did not apply to the relationship among the partners themselves, it could not apply to the process by which an associate attorney becomes a partner. The court responded that, even assuming that Title VII does not apply to the partners themselves, it does apply to the

employer/employee relationship between the firm and the associate. Any discrimination affecting promotions -- in the context of that employer/employer relationship -- is covered by Title VII. 425 F. Supp. at 128. Cf. NLRB v. Bell Aircraft Corp., 206 F.2d 235 (2d Cir. 1953) ("immaterial that the protection . . . afforded was calculated to enable him to obtain a position in which he would no longer be protected"). See also Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973).

POINT II

THE DECISION OF THE ELEVENTH CIRCUIT RELIES ON A MISTAKEN VIEW OF THE ASSOCIATIONAL RIGHTS OF PARTNERSHIP

The Eleventh Circuit, in deference to what it perceived to be the associational rights of partners in law firms, held that a promotional opportunity for associates to partnership was not covered by Title VII. Although the Eleventh Circuit conceded that Title VII applies to promotions, even where the new position would not be covered by the statute, it could not "find the requisite Congressional intent to permit Title VII's intervention into matters of voluntary association." 678 F.2d at 1026. In the Eleventh Circuit's view, to treat the law partnership decision as an "employment opportunity" within the meaning of the statute would be to encroach impermissibly "upon individuals' decisions to voluntarily associate in a business partnership." Id. at 1028. In so holding, the

court below misconstrued the intent of Congress and the nature of constitutionally protected rights of association.

A. Congress did not intend an associational exception to Title VII of the sort found by the Eleventh Circuit.

Congress, in Title VII, did provide in a few limited situations for a balance between its remedial objectives and associational interests, where it deemed the latter to be particularly important. It did not, however, intend to allow such interests generally to preempt the statutory goal of eliminating invidious discrimination in employment. Thus, when Congress intended to create "associational" exceptions to Title VII, it did so directly and unambiguously. The statute is quite precise about where the line is drawn. It provides that employers are exempt if they have fewer than fifteen employees. 42 U.S.C. §2000e(b). As Senator Humphrey explained during the debate on Title VII, businesses, once they reach or exceed the

statutory number of employees, as a practical matter "lose most of whatever intimate, personal character they might have had." 110 Cong. Rec. 13088 (1964). Larger business organizations -- including partnerships -- cannot, therefore, rely on associational claims to avoid the statutory proscriptions against discrimination.

Similarly, "bona fide private membership club(s)" are exempt, 42 U.S.C. 2000e(b) (emphasis added), as are religious organizations which employ "individuals of a particular religion to perform work connected with . . . [their] activities," 42 U.S.C. 2000e-1. In both cases, Congress -- through express statutory provisions -- carved out precisely-defined exceptions for unusually powerful claims of free association. Nothing in the statute suggests that Congress intended this list of exceptions to be merely illustrative. If Congress had intended to add an exception for large law firms or other partnerships, Congress knew how to create one.

Even if a persuasive argument could be made for protecting the associational interests in firms with very few partners, a broad exemption for promotion to partnership is not warranted. Many, if not most, such small firms are already exempt from Title VII on one or both of two grounds. They may not meet the statutory requirement of having fifteen or more employees.* In addition, many small firms do not have a practice of making partners from the ranks of their associates, and, hence, no "promotions" within the meaning of the statute occur. If the Court believes that either the purposes of the statute or constitutional considerations demand a broader exception than

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* Existing case law suggests that the partners themselves are not counted when determining whether the fifteen-employee threshold has been reached. Burke v. Friedman, 556 F.2d 867 (7th Cir. 1977); cf. Lucido v. Cravath, Swaine & Moore, supra at 128 (suggesting but not deciding that partners are not themselves "employees" for purposes of Title VII).

this on privacy grounds for small partnerships, such exceptions could be carved out in later cases on appropriate facts.* At the very least, large partnerships like King & Spalding, which regularly promote their employees to partnership, cannot claim such a high degree of intimacy among themselves that they should be distinguished from other sorts of business organizations of comparable size on associational grounds.

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* Significantly, in Buckley v. Valeo, 424 U.S. 1, 68-74 (1976), where a potential threat to associational rights was recognized with respect to supporters of minor parties and independent candidates under provisions of the Federal Election Campaign Act, this Court did not -- as the Eleventh Circuit did here -- simply carve out from the reporting requirements of the Act a general exemption for contributors to minor parties and independents. Instead it left the issue to be resolved on a case-by-case basis as specific claims arose. Id. at 74. Thus, even where classic rights of association for political speech were involved, this Court has eschewed the wholesale rejection of the applicable statutory provision adopted by the lower courts in this case.

This view of the balance between the objectives of Title VII and associational rights is consistent with lower court authority on the point. With the exception of the two opinions below in Hishon, courts have been loathe to carve out exceptions to the statute to protect associational and related interests. Lucido v. Cravath Swaine & Moore, supra, the only case other than Hishon to address the promotion of associates to partnership in law firms, rejected the argument that Congress did not mean Title VII to reach such promotions because it would infringe First Amendment rights. Id. at 129.

A comparable issue has faced courts in reviewing tenure decisions at colleges and universities. Schools argued that their interest in academic freedom -- an interest akin to rights of association and arising similarly under the First Amendment -- required courts virtually to abstain from reexamining the basis

for tenure denials. Powell v. Syracuse University, 580 F.2d 1150, 1153-54 (2d Cir. 1978). Indeed, tenure decisions -- like elevation to partnership -- do differ in significant ways from ordinary promotions and other employment decisions. As Judge Friendly once commented, "In contrast to an ordinary teaching position, terminable at the end of any academic year, . . . advancement to tenure entails what is close to a life-long commitment by a university . . . ." Lieberman v. Gant, 630 F.2d 60, 64 (2d Cir. 1980). Yet despite their sensitivity to the claims of universities and colleges, the lower courts have refused to interpret Title VII to mean that "academic freedom embraces the freedom to discriminate." Powell v. Syracuse University, 580 F.2d at 1154. Accord, Lieberman v. Gant, supra; Kunda v. Muhlenberg College, 621 F.2d 532 (3d Cir. 1980). The courts agree that Congress intended to rectify employment bias in academic institutions and therefore recognize

that a reluctance by judges to second-guess a school's assessment of academic performance cannot be allowed to result in effective nullification of that basic congressional intent.

In short, the Eleventh Circuit's narrowing of the reach of Title VII is supported neither by reference to its broad remedial purpose, nor by the structure of the act.

B. The Eleventh Circuit misapplied settled principles of law governing rights of free association.

1. Rights of association cannot justify discriminatory practices.

In addition to misreading Congress's intent in Title VII, the Eleventh Circuit misapplied constitutional law relating to freedom of association. The court expressed concern that if Title VII were to be applied to promotions to partnership, the result would be to encroach "upon individuals' decisions to voluntarily associate in a business partnership." 678 F.2d at 1028. The District Court

was even more explicit in voicing the constitutional ground for its decision. Judge Edenfield quoted the following language from a concurrence by Justice Goldberg in Bell v. Maryland, 378 U.S. 226, 313 (1964), to support his view that associational interests of business partnerships outweigh the anti-discrimination policies of Title VII:

> Prejudices and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of personal prejudices including race. These and other rights pertaining to privacy and private association are themselves constitutionally protected liberties.

Hishon v. King & Spalding, 25 Empl. Prac. Dec. (CCH) ¶31,703 at 20,061 (N.D.Ga. 1980).

Whatever the view of twenty years ago, Justice Goldberg's language is not an accurate statement of the law today. This Court in a number of contexts has clearly stated that acts of discrimination may not escape regulation

simply by cloaking themselves in the mantle of First Amendment rights of association. When the First Amendment was raised as a defense by proprietors of a racially discriminatory private school who were sued for depriving black children of their civil rights under federal law, this Court responded that:

> "it may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable . . . . But it does not follow that the practice of excluding racial minorities from such institutions is also protected by the same principle."

Runyon v. McCrary, 427 U.S. 160, 176 (1976). Similarly, in Norwood v. Harrison, 413 U.S. 455, 470 (1973) -- a challenge to loans by Mississippi of textbooks to students in racially segregated private schools -- this Court said:

> "Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections."

Although citizens are constitutionally protected in their right to band together to promote ideas -- including the idea that discrimination on such bases as sex, race or religion is desirable -- they cannot claim the same constitutional shield when they translate their beliefs into acts which invidiously discriminate in violation of the law.*

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* Cf. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258-59 (1964) (upholding constitutionality of the public accommodations provisions of Title II of the Civil Rights Act of 1964):

> "The only questions are: (1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate. If they are, appellant has no 'right' to select its guests as it sees fit, free from governmental regulation."

See also Railway Mail Ass'n v. Corsi, 326 U.S. 88, 93-94 (1945) (due process does not prohibit state from banning racial discrimination in union membership).

2. Even where associational rights are at stake, courts must balance competing interests -- not ignore them.

Even in cases where associational rights ordinarily entitled to constitutional protection can be demonstrated, those rights may nevertheless be limited if they conflict with sufficiently important national interests. Although freedom to associate for political purposes is a central value under the First Amendment, even there this Court has recognized that compelling government purposes can justify substantial limitations on the right. As this Court stated in CSC v. Nat'l Assoc. of Letter Carriers, 413 U.S. 548, 567 (1973): "Neither the right to associate nor the right to participate in political activities is absolute . . . ." Thus this Court has upheld laws limiting the rights of federal employees to participate in electoral campaigns, CSC v. Nat'l Assoc. of Letter Carriers, supra. This Court has also approved

limitations on the rights of private citizens to band together in support of political candidates on the grounds that regulation of their campaign contributions would help avoid the appearance and the reality of political corruption. Buckley v. Valeo, 424 U.S. 1, 24-28 (1976).

In short, this Court has expressly recognized that even when the right to associate would otherwise prevail, a compelling state interest can justify a narrowing of the right. The contrast between this Court's treatment of associational claims and the analyses of the Circuit and District Courts in this case is striking. The courts below resolved the conflict between Title VII and rights of association by simply eliminating the statute from their calculus, thereby ignoring this Court's frequent recognition of the need to balance associational claims against competing interests.

3. The Eleventh Circuit's view of associational rights ignores the essential commercial nature of law firm partnerships.

Finally, the excessive solicitude of both the Eleventh Circuit and the District Court for associational rights is particularly misplaced where, as here, it is a commercial enterprise -- a law firm -- whose associational interests are at stake. There is much in the opinions of this Court to suggest that entities do not enjoy the same measure of First Amendment protection in their commercial activities as they do in their political speech and associations. As one legal scholar has expressed it, this Court's decisions do not suggest that rights of free association are at stake whenever individuals act in concert. Rather:

> "[w]hat the Court has recognized as implicit in the first amendment . . . is a right to join with others to pursue goals independently protected by the first amendment -- such as political advocacy, litigation (regarded as a form of advocacy), or religious worship."

L. Tribe, American Constitutional Law 702 (1978) (emphasis in original) (footnotes omitted). Economic entities -- even those which are organized to perform important professional services -- cannot claim constitutional immunity from regulation solely because they happen to involve voluntary associations.

For example, this Court summarily affirmed a decision by a three-judge District Court permitting the State of Texas to allow only licensed physicians to incorporate for purposes of providing health care. Garcia v. Texas State Board of Medical Examiners, 384 F. Supp. 434 (W.D. Tex. 1974), summ. aff'd 421 U.S. 995 (1975). The non-physicians had claimed that denial of their right to incorporate infringed their interest in free association. The three-judge court responded that, while professional, business and labor groups had on occasion successfully asserted a constitutionally protected right to associate, the

claims had been based on very special facts. Either the group had been attempting to protect a right to communicate with its own members, or had been trying to advance "legitimate beliefs and ideas." 384 F. Supp. at 440. In no case had the professional or business activities of the group been deemed per se entitled to First Amendment protection.

Two other recent decisions by this Court also illustrate the difference between commercial associations which can be freely regulated and those associations which are entitled to special protection under the Bill of Rights. Those opinions are particularly pertinent because they involve the practice of law.

In re Primus, 436 U.S. 412 (1978), involved a South Carolina attorney who had been reprimanded for improperly soliciting a client. The attorney, on behalf of the American Civil Liberties Union, had contacted a woman who had been sterilized as a condition of continued

receipt of Medicaid and had arranged to represent her. Relying on NAACP v. Button, 371 U.S. 415 (1963), this Court set aside the reprimand, holding the attorney's action in seeking out an association with the client to be protected under the First Amendment because it was designed to further political expression. In so ruling, this Court expressly noted that this solicitation was not like "traditional fee-paying arrangements" and could not be viewed as "motivated by consideration of pecuniary gain rather than by . . . [the] goal of vindicating civil liberties." 436 U.S. at 429-30.

On the same day, this Court decided Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978). Again, an attorney had been disciplined for improperly soliciting clients. In contrast to Primus, however, Ohralik's solicitation had no elements of political expression; it was commercial enterprise -- pure and simple. The

Court upheld this attorney's suspension. 436 U.S. at 455-56. As this Court explained:

> "A lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns. It falls within the State's proper sphere of economic and professional regulation." Id. at 459.

This lesser degree of protection for associational interests growing out of commercial activity was also a basis for the district court's decision in Lucido, supra.

This distinction between special associational protection for political, religious and related purposes on the one hand, and lesser protection for commercial enterprise on the other, has particular salience in the context of law firm partnership decisions. Law firms are businesses. Defendant King & Spalding, at the time of its partnership decision concerning plaintiff, was composed of fifty-two partners. (On June 30, 1982, it had over sixty partners).

In fact, as of the middle of 1982, there were 90 law firms in the United States each having more than 60 partners and 15 each having more than 100 partners; the largest law firm had 236 partners. National Law Journal, National Law Firm Survey, Sept. 13, 20, 1982. These business entities are radically different from the small partnership that the judges below envisioned in carving out this new and unwarranted exemption from Title VII.

The manner of governance of King & Spalding highlights this fact. Like a corporation, it is governed by a board -- denominated management committee -- of five partners elected to staggered three-year terms. This committee makes recommendations on such matters as admission of partners to the general partnership. The American Lawyer Guide to Law Firms; 1981-82, p.57 (hereinafter "Guide"). Most large law

partnerships are governed by a board or committee, sometimes chosen by the partners and sometimes self-perpetuating. In many of the large partnerships described above, the election of partnerships by the partners is a mere formality following selection by the governing committee. In some firms, partners' shares are designated by the managing board without any formal input by the partnership itself. (Guide at 644).

Nor are these partnerships geographically compact. Their partners are often found in many locations, often miles apart. For example, the 236 partners of Baker & McKenzie are located in 28 cities spanning 5 continents. In fact, the partners in many such partnerships not only are given salary-like profit levels--rather than a percentage of profits as in the traditional, intimate model-- but may be, in effect, discharged by the management of the partnership as if they were employees.

Further support for the view that commercial activities do not, standing alone, have a claim to associational protection under the Constitution can be found in the structure of several important civil rights statutes of the past twenty years. These statutes illustrate that when Congress intended to defer to the associational interests of commercial entities, it made clear distinctions in the law for that purpose. The public accommodations provisions of Title II of the Civil Rights Act of 1964, for example, are broadly inclusive, and give citizens a right to enjoy "goods, services, facilities, privileges, advantages, and accomodations" without regard to "race, color, religion, or national origin." 42 U.S.C. §2000a(a). Among the few businesses excepted from coverage are establishments which offer five or fewer rooms for rent and have a proprietor who lives in the building, 42 U.S.C. 2000a(b)(1); private clubs;

and places not open to the public. 42 U.S.C. 2000a(e). In each of these exemptions, the commercial entities that are protected from governmental regulation reflect true privacy interests.

Similarly, the federal Fair Housing Act of 1968 exempts private individuals who sell or rent their houses, 42 U.S.C. §3603(b)(1); or dwellings with four or fewer units only "if the owner actually maintains and occupies one of such living quarters as his residence." 42 U.S.C. §3603(b)(2). The Act does reach, however, virtually all other sales or rentals of housing that could fairly be characterized as "commercial".

In each of these statutory settings, Congress specified certain commercial entities whose associational rights should be secured against legislative interference. Congress did not intend to add, willy-nilly, any and all

other commercial enterprises to this small and discrete list of exceptions to the Law.

Thus, while law partnerships may have rights of free association when they seek to express ideas or advocate political positions, they do not enjoy the same protection for the sorts of business-oriented choices King & Spalding now wishes to protect. Law firms as commercial entities could not, under the rubric of free association, admit nonlawyers to the practice of law in violation of state regulations. No more should they be able to use "voluntary association" claims to shield their promotion practices from the reach of general laws that prohibit sex and race discrimination in employment.

CONCLUSION

The Eleventh Circuit has carved out a substantial exception from the reach of Title VII -- one of the centerpieces of civil rights legislation. That exception, for promotions to partnerships, is not founded in congressional intent, the express statutory language, or applicable case law dealing with the First Amendment right of free association. It represents an unprecedented, unwarranted dilution of the hard-won rights of women and minorities and should not be allowed to stand.

This is not to say that partners may exercise no reasonable choice about who their peers shall be. Title VII, prohibits, inter alia, sex discrimination in employment. It does not inhibit a partnership's traditional exercise of discretion in the non-discriminatory selection of new members. The Lucido court recognized this principle and correctly applied it.

The Eleventh Circuit, however, incorrectly viewed Title VII as wholly subordinated to partnerships' associational claims.

Because the Eleventh Circuit misread the intended coverage of Title VII, its decision must be reversed and the matter remanded for trial on the merits.

Dated: May 4, 1983
New York, New York

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ELIZABETH ANDERSON HISHON,

Petitioner,

—v.—

KING & SPALDING,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* FOR AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; AMERICAN SOCIETY OF PROFESSIONAL AND EXECUTIVE WOMEN; CONNECTICUT WOMEN'S EDUCATIONAL AND LEGAL FUND, INC.; EQUAL RIGHTS ADVOCATES, INC.; NATIONAL BAR ASSOCIATION, WOMEN LAWYERS' DIVISION; NATIONAL WOMEN'S LAW CENTER; NORTHWEST WOMEN'S LAW CENTER; NOW LEGAL DEFENSE AND EDUCATION FUND; WOMEN'S EQUITY ACTION LEAGUE; WOMEN'S LAW PROJECT; AND WOMEN'S LEGAL DEFENSE FUND

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INTEREST OF AMICI CURIAE

This brief amicus curiae in support of petitioner is submitted on behalf of the American Association of University Women; American Society of Professional and Executive Women; Connecticut Women's Educational and Legal Fund, Inc.; Equal Rights Advocates, Inc.; National Bar Association, Women's Lawyers Division; National Women's Law Center; Northwest Women's Law Center; NOW Legal Defense and Education Fund; Women's Equity Action League; Women's Law Project; and Women's Legal Defense Fund.*/ These organizations are dedicated to the principle of equal treatment under the law and to the elimination of sex and race discrimination in employment.**/ Amici believe that this case is of great importance for the full effectuation of Title VII's mandate to eliminate employment discrimination.

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*/ Letters from counsel for the parties, consenting to the filing of this brief, are being filed with the Clerk.

**/ Statements describing each organization appear in the Appendix to this brief.

STATEMENT OF THE CASE

Petitioner, Elizabeth Anderson Hishon, an honors graduate of Columbia University School of Law, was employed in 1972 as an associate by King & Spalding, an Atlanta law firm of more than 50 partners, more than 50 associates and more than 50 non-attorney support staff personnel. She was only the second woman lawyer to be employed by the firm. Among the factors that influenced her decision to accept employment at King & Spalding were representations that she would be considered for partnership after satisfactory completion of five or six years of employment. After she did not receive a promotion to partnership, Ms. Hishon was discharged in 1979 pursuant to the firms's "up or out" policy. She brought suit under Title VII, claiming discrimination on the basis of sex.

The District Court for the Northern

District of Georgia, after refusing to grant discovery on the merits, dismissed Ms. Hishon's complaint under Fed. R. Civ. P. 12(b)(1), holding that, as a matter of law, Title VII did not govern decisions to promote an associate in a law firm to partnership. 24 FEP Cases 1303 (N.D.Ga. 1981). On appeal, the Court of Appeals for the Eleventh Circuit affirmed, over the vigorous dissent of Circuit Judge Tjoflat. 658 F.2d 1022 (11th Cir. 1982).

SUMMARY OF ARGUMENT

The ruling of the courts below, exempting decisions involving promotion to law firm partnerships from scrutiny under Title VII, should be reversed by this Court. In the face of more than a century of overt discrimination against women in law, the decision, if sustained, would reverse the very real and substantial progress women have made towards achieving equality of employment opportunity in the legal profession.

The decision should be reversed because it is based on an inaccurate and idealized view of partnerships as purely voluntary organizations distinct from other corporate forms of business organization. In fact, partnerships in the legal profession, as well as many other professions, are commonly large, complex business organizations, and are functionally very similar to the corporate form of professional business organization.

Contrary to the ruling below, the failure to promote petitioner to partner, resulting in her termination due to King and Spalding's "up-or-out" policy, was an employment decision cognizable under Title VII. Lucido v. Cravath Swaine & Moore, 425 F. Supp. 123, 127 (S.D.N.Y. 1977) and is therefore a "term, condition, or privilege" 42 U.S.C. § 2000e-2(a)(1981) of employment as an associate. Title VII's broad mandate to eliminate employment discrimination clearly

extends to promotional opportunities. Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975).

Moreover, the Eleventh Circuit erred in its analysis of the interests at stake in this case. This Court has expressly held that discriminatory acts are not justifiable in the name of free association, Norwood v. Harrison, 413 U.S. 455, 470 (1973), and that governmental policies intended to further compelling governmental interests, such as those embodied in Title VII, may justify restrictions on associational interests. CSC v. Nat'l Assoc. of Letter Carriers, 413 U.S. 548 (1973).

Finally, the widespread use of the partnership form of business organization by numerous professions and industries throughout our economy would extend the effect of the lower court's ruling far beyond simply law firms.

I. THE DECISION BELOW WOULD UNDERMINE THE SUBSTANTIAL PROGRESS WOMEN HAVE MADE TOWARDS ACHIEVING EQUALITY OF EMPLOYMENT OPPORTUNITY IN THE LEGAL PROFESSION.

It has been over one hundred years since Mr. Justice Bradley upheld the right of Illinois to deny Myra Bradwell admission to the practice of law, characterizing her exclusion as an "adaptation" necessary to preserve and protect women's proper role in society:

> It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.

Bradwell v. Illinois, 83 U.S. (16 Wall) 130, 141-42 (1873).

The case of Myra Bradwell is, today, an unfortunate and embarrassing relic of judicial history. No state would presently deny a woman the right to practice law solely because of her sex. But while women have indeed made substantial progress towards achieving equality in the legal profession, the entrenched biases of more than a century of overt discrimination against them continue to impede their full integration and participation at the highest and most prestigious levels of the profession, specifically, elevation to partnership in large law firms.

It is, of course, the legality under Title VII of discriminatory practices engaged in by law firms to limit women's opportunities for promotion to partner which is at issue in this case. As the last major barrier to true equality in their employment, its importance cannot be overstated. The ruling below, which would deny

women, as well as male members of minority groups, the right to invoke the protections of Title VII at this critically important stage of their careers, is a devastating step backwards, and should be overturned by this Court.

The importance of this ruling is underscored by acknowledging that it is only since the passage of Title VII nearly twenty years ago that women have emerged as a significant demographic group both within the law schools and within the profession. Between 1910 and 1970, women represented less than 4% of this nation's lawyers; in 1982, women comprised approximately 15% of all lawyers. Bureau of Labor Statistics, U.S. Dept. of Labor, Employment and Earnings--Household Data Annual Averages, Table 23, p. 158 (January 1983). The statistics on law school enrollments are even more striking: in 1963, women accounted for only 3.8% of all law students; by 1980, the

percentage of women enrolled in this nation's law schools had risen to 33.5%. C. Epstein, Women in Law 53 (1981).

The reason for the dramatic growth in the participation of women in the law during the last twenty years, following so many years of stagnation, is directly traceable to the elimination of a host of discriminatory practices engaged in by law schools and employers throughout much of the previous period. For example, while most of the "elite" law schools had abandoned their exclusionary admission practices by the turn of the century (Michigan, 1870; Yale, 1886; Cornell, 1887; New York University, 1891; Stanford, 1895). Epstein, supra, at 50, exclusionary policies continued in some instances until as recently as 1972.[1] And even when these exclusion-

[1] Washington and Lee finally began admitting women in 1972. Notre Dame opened its doors to women in 1969, Harvard in 1950, and Columbia in 1928. Epstein, supra, at 50.

ary practices were formally eradicated, women encountered in their place informal quotas limiting their enrollment, and more rigorous admission criteria likewise making it more difficult for them to gain acceptance.[2] Epstein, supra p. 9 , at 51.

Of course, eliminating the barriers to their admission to law school did not immediately remove other obstacles to their advancement in the legal profession. For example, many of the initial women graduates found themselves steered towards only par-

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[2] While admissions officers routinely denied that qualified women were barred by any such quota system, alleging instead that it was women's apparent lack of interest in the law which accounted for their small enrollment, many law school faculty members have since acknowledged that quotas on women had in fact existed until the 1960's. Epstein, supra p. 9 , at 52. The likely existence of quotas and stricter admissions criteria is also indicated in a study published by the Harvard Law Record in 1965. The study noted that although the proportion of women students had remained at 3-4% since 1950, the number of applications had "skyrocketed." In 1951, 19 of the 36 women applicants were admitted; in 1965, only 22 of the 139 women applicants were accepted. Id. at 53.

ticular kinds of legal work. A 1958 U.S. government publication advised women lawyers to concentrate on "real estate and domestic relations work, women's and juvenile legal problems, probate work and patent law," undoubtedly a reflection of women's most realistic job opportunities. Epstein, supra p. 9 , at 81. That law firms were expressly not interested in hiring women prior to the passage of Title VII was further evidenced in a survey undertaken by the Harvard Law Record in 1963, for the purpose of ascertaining what law firms looked for in candidates for employment. The Record asked 430 private law firms across the country which traits they valued most highly in evaluating new recruits, as well as those they deemed undesirable. While firms predictably placed a high value on scholarship and initiative, Epstein, supra p. 9 , at 83, the traits deemed undesirable, other than a poor academic record, included sex (women),

race (Blacks), and religion (Jews). Id. Women were apparently considered undesirable by firms of all sizes in all parts of the country and in fact, while Jews, Blacks, and women were all consistently rated negatively, women drew the most negative rating of the three. Id.[3/]

With the emergence of legal services and public interest law firms, jobs with these agencies also proved predictably more available to graduating women lawyers than big corporations or large law firms, primarily because of their lower salaries and

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[3/] In a 1970 survey of women and men graduates from Harvard Law School, it was found that while women were likely to be awarded more employment interviews than their male colleagues, men received more job offers--a finding which the researcher concluded indicated that women's employment choices were more circumscribed than men's. Glancy, Women in Law: The Dependable Ones, 21 Harv. L.S. Bull. No. 5, 22, 24 (June 1970). In fact, the researcher found that a much higher percentage of men (72%) than women (52%) went to work for law firms immediately following graduation, which was again viewed as a reluctance on the part of law firms to hire women attorneys. Id. at 26.

less attractive working conditions. Hochberger, Women in Law--How Far Have They Come?, New York Law Journal, March 21, 1977, p. 1. A survey conducted by the National Association of Law Placement in 1975 found that, whereas only 5.5% of that year's graduating class went to public interest or legal services jobs, 12% of the women graduates took these positions. Id.

Women did not really begin to gain access to the large law firms until the 1970's. At the beginning of the last decade, there were no more than forty women attorneys employed in New York's largest law firms; by 1980, their numbers had swelled to more than six hundred. Epstein, supra p. 9 , at 175. A look at the hiring patterns in large law firms throughout the country during this same period reveals a similar growth in the percentage of women associates, to over 21%

by 1980.[4] Id.

The striking gains of the 1970's were due in large part to the initiation of lawsuits against some of New York's largest and most prestigious law firms for blatantly discriminatory recruitment and hiring practices.[5] Two of these cases advanced to the trial stage, Kohn v. Royall, Koegel & Wells (now Rogers & Wells), 59 F.R.D. 515 (S.D.N.Y. 1973), appeal dism.,496 F.2d 1094

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[4] A survey conducted by the National Law Journal in 1982 of the 151 largest law firms showed that women comprised about 17% of the lawyers in these firms. Flaherty, Women and Minorities: The Gains, Nat'l Law Journal, Dec. 20, 1982, at 1.

[5] The lawsuits were initiated by a group of New York University and Columbia women law students who were outraged by the conduct and statements of many of the large firms' interviewers. Comments ranged from assertions that women were not good litigators, and that their participation in litigation would have to be limited to brief-writing, to admissions of actual bias in the firms which relegated women to "blue sky" work (keeping abreast of changes in state securities laws), involving virtually no client contact and which is today delegated to paralegals in most large law firms. Epstein, supra p. 9 , at 185.

(2nd Cir. 1974) and Blank v. Sullivan & Cromwell, 418 F. Supp. 1 (S.D.N.Y. 1975). In both cases, the defendant law firms eventually agreed to offer a specific percentage of its positions each year to female graduates, Epstein, supra p. 9 , at 185, as did some of the other law firms cited in the initial complaints (and who were guaranteed anonymity). Id.

Unfortunately, the emergence of women in the last ten to twenty years as a significant proportion of law graduates and associates in large law firms has done little to change their continuing scant representation at the partnership level of these firms. In 1956, there existed only one woman partner among the large New York law firms, Epstein, supra p. 9 , at 179. In 1968, there were three. By the summer of 1980, the number of women partners had increased to 41; at the same time, of the 3987 partners in the 50 largest law firms in the country, only 85 were women. Id. In a

survey conducted by the National Law Journal in 1982 of the 151 largest law firms in the country, women, Blacks, and Hispanics comprised only 4.1% of the partners at those firms. Flaherty, supra p.13, at 9. Thirty-two of the firms surveyed had no women partners at all; 106 had no Black partners and 133 had no Hispanic partners. Id. 6/

The almost total exclusion of women from the highest ranks of the legal profession is particularly troubling at a time when women comprise more than one-third of all law graduates. Flaherty, supra p.13, at 11. In the face of so much progress by the legal profession in eradi-

6/ The 1970 Survey of Harvard Law School male and female graduates, correctly forecast this dismal growth in the number of women partners. Noting that men and women seemed to start out on an equal salary level, but that women quickly fell behind, the research concluded that "most of [the women would] never reach the high income, high status positions many of their male counterparts achieve." Glancy, supra p.12, at 27.

cating the effects of more than a century of discrimination, the decision of the Eleventh Circuit can only further inhibit the ability of women to assume their rightful place beside their male colleagues. The availability of Title VII to many of these women in the 1970's was an invaluable tool for establishing their right to participate on a more equal footing with their fellow graduates. As more and more of these women become eligible for promotion to partnership, this Court must not deny them the right to again invoke the protections of Title VII to ensure that such promotional opportunities are not unjustly denied them. 7/

7/ Congress clearly was concerned that Title VII's coverage extend to highly prestigious jobs. Senator Javits, in opposing a 1972 amendment that would have excluded hospital-employed physicians from Title VII coverage said:

> One of the things that those discriminated against have resented the most is that they...cannot ascend the higher rungs in professional and other life. Yet this amendment would...reinstate

[footnote continued]

the possibility of discrimination on grounds of ethnic origin, color, sex, religion--[among] physicians or surgeons, one of the highest rungs of the ladder that any member of a minority could attain--and thus lock in and fortify the idea that being a doctor or surgeon is just too good for members of a minority...that they have to be subject to discrimination...and the Federal law will not protect them. 118 Cong. Rec. 3802 (1972).

II. THE LOWER COURT'S VIEW THAT THE PARTNERSHIP FORM MANDATES EXEMPTION OF SOME PARTNERSHIP DECISIONS FROM TITLE VII IS ERRONEOUS.

The Eleventh Circuit's dismissal of the complaint was based on an idealized and inaccurate view of the nature of "partnership" as both essentially a voluntary association among partners and as clearly distinct from all corporate forms of business organizations. Hishon v. King & Spalding, 678 F.2d 1022, 1026-28 (11th Cir. 1982). Contrary to the lower court's assumptions, partnerships are business organizations that vary dramatically in their internal structures and the relationships among partners; they also are functionally very similar to the corporate form of professional business organization. The inaccuracy of the Eleventh Circuit's assumptions fatally undermines its justification for exempting decisions about promotion to partnership from Title VII.

A. The Eleventh Circuit's Decision is Based on an Idealized and Inaccurate View of "Partnerships"

The court of appeals concluded that the fundamental character of partnerships required that decisions about promotion to partnership be exempted from scrutiny under Title VII,[8] because "the form is the substance" distinguishing such decisions from all other kinds of employment decisions, even employment decisions made by partnerships. 678 F.2d at 1028. In reaching this conclusion, the lower court fail-

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[8] The explicit exemptions from statutory coverage do not include elevation to partnership. See, e.g., 42 U.S.C. §§2000(e)(b)(bona fide private clubs); 2000e-1, 2000-2(e)(certain religiously based employment). To the extent that many partnerships are small, they may fall within the generalized exemption from Title VII of businesses with fewer than 15 employees. 42 U.S.C. §2000e(b). The qualities of intimacy and voluntariness in partnerships that loomed so large for the lower courts, see 678 F.2d at 1026, 24 FEP Cases 1303, 1304-05 (N.D.Ga. 1980), have been recognized by Congress through this size limitation on Title VII coverage.

ed to recognize the substance behind the form.

In fact, partnerships vary substantially in size, details of organization, and relationships among the partners. Far from being oases of intimacy and collegiality, many partnerships are large businesses that exhibit marked differences among partners in power, income, influence, and formal position.

This is hardly surprising, especially in view of the large size of many partnerships. A 1980 survey found more than 100 law firms with 100 or more lawyers, and 45 with more than 150. National Law Journal, Oct. 6, 1980, at 34-39. King & Spalding placed number 106 on this list. Id. Eighty-two of the firms had at least as many partners as King & Spalding's 51, and twenty had at least 75. Id.

The size of the "Big Eight" account-

ing firms[9] is even more striking. In 1981, these eight firms had approximately 7,000 partners in the United States. N.Y. Times, Jan. 3, 1982, at D1, col.1 . Together these firms employ 150,000 people in 2,500 offices in more than 100 nations. Annually, they interview 160,000 students from United States colleges and universities, hire 10,000 new professional employees and make more than 1,000 new partners. Stevens, supra, at 8. Furthermore, large size is not restricted to these eight firms. Seidman & Seidman, the nation's tenth largest CPA firm, has 160 partners and $50 million in annual revenues. Id. at 160.

Within the management structure of

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[9] They are: Arthur Andersen; Arthur Young; Coopers & Lybrand; Deloitte Haskins & Sells; Ernst & Whinney; Peat, Marwick, Mitchell; Price Waterhouse; and Touche Ross. They are "huge multinational business organizations, the largest professional firms in the world, and some of the most influential powers on earth." M. Stevens, The Big Eight 2 (1981).

such large businesses, there is bound to be a significant degree of differentiation among partners. Some law firms have a chairman or presiding partner, in charge of making day-to-day decisions for the firm. P. Hoffman, Lions in the Street 14, 52 (1973); J. Stewart, The Partners 112 (1983). The degree of power exercised by only one partner in a group of 50 or more can be formidable.

> At [one firm], for example, the presiding partner makes the final determination of each partner's share of income, worked out through individual conferences with partners. He determines the agenda of the partnership's Tuesday lunches. He resolves conflicts among the partners, smoothes ruffled feathers and disciplines when necessary.

Stewart, supra, at 242.

More common is the executive committee, usually made up of a small number of the most senior partners. This institution has been described as follows:

> The executive committee acts as overseer for the firm. It is the deciding group; it settles policy matters and disputes. The main, specific task of the committee is to decide on percentages distributed to partners. Members of the group discuss questions about setting up pension plans or moving their offices. Those at the summit make the initial determination about whether new partners are needed. They decide, if the problem becomes overt, about the optimum size of the firm. The executive committee concerns itself with problems of office morale; of client satisfaction. The committee acts as referee and serves to ease conflict within the firm.

E. Smigel, The Wall Street Lawyer 237 (1963) (footnotes omitted). See also Nelson, Practice and Privilege: Social Change and the Structure of Large Law Firms, 1981 Amer. Bar Fdn. Research J. 97, 120.

More rarely, but quite significantly, partnerships have formally stratified systems. One now-dissolved New York law firm, for example, is described as having two classes of partners: "proprietary" and "non-proprietary." Proprietary partners

match the Eleventh Circuit's idea of "partners," who have an interest in the profits of the firm and make crucial decisions, such as who else will become a proprietary partner. Non-proprietary partners, however, strongly resemble what even the Eleventh Circuit would agree are "employees." They are essentially salaried, and able to share in profits only at the discretion of the proprietary partners. National Law Journal, Apr. 25, 1983, at 9, col. 1.[10/]

A very strong centralization of control over business decisions is also evident in large accounting partnerships. They have executive committees, chairmen (or managing partners), and vice-chairmen.

10/ Although rare, such formal stratification is not extinct. For example, a small number of employers recruiting at Harvard Law School in 1982 indicated the existence of a formal "junior partner" status in their firms. Harvard Law School Placement Office, Employer Directory Fall 1982 (available in Harvard Law School Library).

These partners "establish current and long-term policies, set procedures, [and] approve partner earnings..." Stevens, supra p.22, at 32-33. The autonomy of the less powerful partners is severely limited, as noted by Stevens:

> Each partner's interest in a Big Eight firm is only a tiny fraction of a percent. What's more, they can be reprimanded, shifted from client to client, and relocated across the fifty states, often against their will. This is hardly the kind of treatment 'business owners' have to tolerate.

Id. at 32.

Large differences among partners is further reflected in their widely varying incomes. Even the "edited version," 678 F.2d at 1025, of King & Spalding's 1974 partnership agreement, supplied during discovery in the instant case, strongly suggests that not all active King & Spalding partners receive equal shares of the partnership income. See Joint Appendix (hereinafter, "Jt.App.") at 155. A decade ago,

a survey of law firms of twenty-five or more lawyers reported a large disparity in earnings among partners. Almost half the firms that responded indicated that their highest paid partners earned at least four times the income of their newest, and least well-paid, partners. Orren, A Look Inside Those Big Firms, 59 A.B.A.J. 778, 779 (1973).

A similar pattern exists in accounting firms. For example, new partners at Touche Ross earn $50,000 a year, whereas the firm's chairman earns at least $500,000 a year. Even at Price Waterhouse, which has the smallest intra-partnership earning disparities among the "Big Eight," partners' salaries range from $75,000 to $200,000. Stevens, supra p. 22, at 31.

As the above discussion demonstrates, many partnerships are large, complex, highly structured and highly stratified business organizations. Instead of looking at the realities of the many varieties of part-

nership structure and practice, especially of the large professional partnerships, the court of appeals relied on an idealized vision of "a partnership." In so doing, it erroneously constricted the reach of Title VII.

B. The Eleventh Circuit Erroneously Construed Title VII by Focusing on Formal Differences and Ignoring Functional Similarities Between Corporate and Partnership Forms of Organization in Professional Services Businesses

The inadequacy of the lower court's conception of the partnership form as limiting Title VII's coverage is further demonstrated by comparing partnerships to the analogous corporate form, the professional corporation. These two forms of business organization do not differ in any respects that are significant for purposes of Title VII analysis. However, in a professional corporation, the principals are employees of the corporation. Applying the Eleventh Circuit's "clear distinction between the

employees of a corporation and the partners of a law firm," 678 F.2d at 1028, would then yield the odd result that all employment decisions made by law firm professional corporations would be subject to scrutiny under Title VII, but some decisions by law firm partnerships would not be. The functional similarity between partnerships and professional corporations, however, shows both the shallowness of the lower court's analysis and the dangers to Title VII if this Court adopts that analysis.

The principal difference between partnerships and professional corporations has been in aspects of federal income tax treatment of the two forms. Certain disparities in the tax treatment of corporations, on the one hand, and self-employed professionals on the other, triggered the development of professional corporations side by side with partnerships. See Blum, Professional Incorporation: Social Change Created by

the Tax Laws, 14 Tax Notes 51 (Jan. 11, 1982); Wood, The Desirability of Professional Corporations after the Economic Recovery Tax Act, 60 Taxes 261 (1982). For high income taxpayers the difference in treatment of pension contributions was significant. In 1981, the maximum deductible annual contribution to her Keogh (or H.R.10) plan was the lesser of 15 per cent of her net earnings from self-employment, or $15,000. S. Rep.No. 494, 97th Cong., 2d Sess. 314 (1982). By contrast, the maximum deductible contribution for a corporate plan covering a lawyer was $45,475 for 1982. Id. at 313. In both cases, these funds, in a qualified pension trust, would earn investment income tax-free, and would be taxed to the beneficiary only when received after retirement. However, this differential has been largely eliminated by the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. 97-248 ("TEFRA"). See Conference Com-

mittee Report, H.Rep.No. 760, 97th Cong., 2d Sess. 621 (1982)("The Conference agreement generally eliminates distinctions in the tax law between qualified pension, etc. plans of corporations and those of self-employed individuals....").

Aside from these tax differentials in benefits programs, there are virtually no significant substantive differences between partnerships and professional corporations. For example, a professional corporation must adhere to corporate formalities. See Rev. Rul. 70-101, 1970-1 C.B. 278-280, amplified Rev. Rul. 70-455, 1970-2 C.B. 257; Rev. Rul. 72-468, 1972-2 C.B. 647, modified Rev. Rul. 73-556, 1973-2 C.B. 424, amplified Rev. Rul. 74-439, 1974-2 C.B. 405, Rev. Rul. 82-212, 1982 U.S. Tax Week 1973. Professional corporations are also subject to payroll-based taxes, such as the federal unemployment tax, on all their professional employees, while partnerships are not so

taxed on their partners. See Tax Management Portfolio - TEFRA at A-270 and note 55 (1983).

In the two areas where one might expect the traditional distinction between corporate and partnership forms to be significant for Title VII purposes, it does not exist. Because of considerations of professional ethics and licensing, partnerships and professional corporations alike do not have the traditional corporate attributes of limitation of individual liability and ability freely to transfer shares and/or raise outside capital.

Professional corporation statutes do not generally allow a professsional to escape liability for her own torts (e.g., malpractice), nor those committed by those under her supervision. See, e.g., Ga. Code §14-7-7 (1982); N.Y. Bus. Corp. Law §1505(a)(McKinney's Supp. 1982). Indeed, in Georgia the professional corporation

form has been held not to insulate the professional employees of the corporation from liability for the torts committed by other professional employees. First Bank & Trust Co. v. Zagoria, 51 U.S.L.W. 2529 (Ga. Feb. 23, 1983).

Moreover, professional corporation statutes generally require that all stock in professional corporations be owned by persons licensed for, and actively engaged in, the practice of the relevant profession. See, e.g., Ga. Code §14-7-5(a)(1982); N.Y. Bus. Corp. Law §§1507, 1511 (McKinney Supp. 1982). In essence, such statutory requirements have eliminated the traditional corporate separation between "ownership," through ownership of stock that is freely transferable, and "employment" in the corporation. In practice, stock in professional corporations is held by professional employees of the corporation. This ownership interest, however, does not make the prin-

cipals any the less employees of the corporation.

These limitations on the traditional attributes of corporations in the professional corporation context serve to highlight the inadequacy of the lower court's view that the uniqueness of partnerships requires that they be given special exemption from Title VII.[12/] The functional simil-

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[12/] Moreover, by focusing on the partnership form as the basis for its decision, the court of appeals presented the possibility that businesses wishing to avoid Title VII liability for some employment decisions could become partnerships in order to ignore Title VII. Although there are usually strong economic disincentives involved in choosing a form of business organization for such reasons, even in part, there is currently an opportunity for professional corporations to convert to partnerships without some of the usual economic consequences. Ordinarily "disincorporation" of a successful professional corporation would be likely to precipitate a significant tax liability to the shareholder-employees, see 26 U.S.C.A. §331(a)(West Supp. 1983); 26 U.S.C.A. §1001 (West 1982). Recognizing that TEFRA's elimination of pension-related tax benefits might cause some professional corporations to liquidate, Congress enacted TEFRA §247 (not codified) as "disincorporation relief." Conference Committee

arities between the corporate and partnership forms of organization demonstrate that the Eleventh Circuit's distinction between corporations and partnerships is indeed form without substance.

[footnote con't]

Report, H.Rep.No. 760, 97th Cong. 2d Sess. 634 (1982). In 1983-1984, professional corporations will be able to liquidate without many of the negative tax consequences that usually attend such a change. Thus, there is little or no economic barrier to changing the partnership form of business organization in order to avoid Title VII. In addition, it is possible that some partnerships in non-professional fields that might have economic reasons for wanting to incorporate, would forego incorporation in order to retain their partial immunity to Title VII. The decision of the court of appeals, which permits these perverse results, would seriously undermine Title VII's goals.

III. DECISIONS ON PROMOTION TO PARTNERSHIP ARE EMPLOYMENT DECISIONS SUBJECT TO SCRUTINY UNDER TITLE VII

A. The Termination of Employment as the Result of an "Up or Out" Policy is an Employment Decision Under Title VII

As Judge Tjoflat correctly observed, Ms. Hishon was fired from King & Spalding. 678 F.2d at 1030. Although King & Spalding contended below that Ms. Hishon's losing her job was merely an effect of the decision not to offer her partnership, that distinction is both artificial and false. In the "up or out" policy adhered to by King & Spalding, 678 F.2d at 1024, failure to become a partner and failure to maintain one's employment as an associate are two sides of the same coin. "Up or out" promotion policies are almost universal among large law firms. Hoffman, supra p. 23, at 6-7; Smigel, supra p. 21, at 44, 114-16; Nelson, supra p. 24, at 122. "Permanent associates are a dying breed."

Hoffman, supra, at 144; see also Stewart, supra p. 23, at 156.[13/] Associates either become partners or must leave the law firm; in short, get promoted or get fired. See Jt. App. at 31-32 (Answer ¶9).

Discriminatory discharge is explicitly proscribed by Title VII. 42 U.S.C. §2000e-(a)(1). There is no question that, at the time of her discharge, Ms. Hishon was an employee of King & Spalding. Jt. App. at 48-49 (affidavit of James Sibley). In the analogous situation presented in Lucido v. Cravath, Swaine & Moore, 425 F.Supp. 123, 127 (S.D.N.Y. 1977), the district court held that the plaintiff had been an employee of the defendant law firm throughout the period of the alleged discrimination, including his failure to be made a partner

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13/ Interestingly, King & Spalding had one permanent associate at the time Ms. Hishon was hired. The permanent associate was also the only woman associate in the firm's 87-year history to that point. Jt. App. at 187.

and consequent discharge from the firm. The Eleventh Circuit in the instant case failed to apply the correct analysis developed by the court in Lucido, and erroneously affirmed the dismissal of Ms. Hishon's claim.

Moreover, in the specialized area of academic employment, where tenure decisions are strikingly similar to the "up or out" partnership decisions at issue in this case, courts have applied Title VII in scrutinizing decisions not to award tenure to faculty members. See Lieberman v. Gant, 630 F.2d 60, 64 (2d Cir. 1980); Kunda v. Muhlenberg College, 621 F.2d 532, 535 (3d Cir. 1980). Like the decision to promote an associate to partner, tenure decisions are made after periodic evaluation of the employee's suitability for tenure and they confer what is essentially a guarantee of continued employment. See Lieberman v. Gant, 630 F.2d at 64. Also, as with partnership,

a tenured employee is moved into the ranks of those people who make the important managerial decisions about the enterprise--including, significantly, decisions about who else should be awarded tenure. See NLRB v. Yeshiva University, 444 U.S. 672 (1980). Most importantly, the failure to be awarded tenure is also followed by loss of academic employment in that institution.

Tenure decisions, as well as partnership decisions, are the result of complex and varying processes. The complexity of the tenure decision-making process, however, has not led courts to hold them to be outside the scope of Title VII. Similarly, there is no reason to conclude in the instant case that because King & Spalding's process of discharging Ms. Hishon was complex and protracted, it produced something other than a discharge. Ms. Hishon's allegation that the discharge was in violation of Title VII is a claim over which the fed-

eral courts have jurisdiction, and the Eleventh Circuit erroneously dismissed it.

B. Progression from Associate to Partner is Clearly an Expectation of Employment as an Associate

Large law firms, such as King & Spalding, generally recruit law school graduates as associates, give the associates a certain number of years to prove themselves, and then either promote them to partnership or fire them. See Jt. App. at 30-32 (Answer ¶s 8-9); Hoffman, supra p. 23, 6-7; Smigel, supra p. 24, at 114-16; Nelson, supra p. 24, at 122. Thus, partnership is a critical component of an associate's career path in the firm.

Law firms recruit law school graduates for jobs as associates with clear reference to the ultimate goal of partnership. It is commonly understood by students that successful performance as an associate is rewarded with partnership. It is also understood by law firms that employment of

associates is the first step in acquiring new partners. Many law firms take the position that "they hire only people of partnership caliber." Nelson, supra p. 24 , at 126. More significant than the general statement is the fact that many firms specifically use this argument in recruiting new associates. For example, a sampling of information supplied by firms recruiting at Harvard Law School in 1982 reveals that a significant number tell students that they only hire potentially partnership-worthy people as associates.[14/] About a quarter of the firms in Atlanta, half the Houston firms, a third of the Boston firms, a third of the Chicago firms, and a fifth

14/ The sample of law firms considered here includes only those submitting an individual statement, in addition to the standardized form required by the Harvard Law School Placement Office. Thus, the percentages can not be generalized to apply to all firms in each city. Nevertheless, they are significant evidence of prevalence of the clearly marked career path from new associate to partner. (Information available in Harvard Law School Library).

of the Los Angeles firms presented themselves as hiring people they consider capable of becoming partners. The connection between associateship and partnership that is evident in the recruiting practices of large law firms contradicts King & Spalding's contention that promotion to partnership is wholly different from other employment decisions made by law firms.

Once an associate begins working in a large law firm, the work, incentives, and system of performance evaluation are geared toward partnership as the goal. The possibility of becoming a partner is "the strongest reward" in the incentive system of almost all large law firms. Smigel, supra p. 24, at 259. The years of hard work and long hours that most associates put in are part of their jobs as associates, but are also the key building blocks in advancement to partnership. Associates work hard because they know that it will help them to be-

come partners. See, e.g., Stewart, supra p. 23 , at 86.[15/]

Similarly, the evaluation of associates' work, in most large firms, stresses the associate's partnership potential. Such partnership-oriented evaluations may begin as early as two years after an associate has been hired. National Law Journal, Apr. 4, 1983 at 40, col. 1. The longer an associate has been with the firm, the more clearly connected to partnership the evaluations become. See Jt. App. at 46-47 (affidavit of James Sibley). King & Spalding, like many other large firms, has institutionalized this process, making partnership decisions a fixed number of years after an associate is hired. 678 F.2d at 1024. The partnership decision itself is merely the most definitive in the series of evaluations

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15/ A similar incentive pattern is found in large accounting firms. See Stevens, supra p. 22 , at 28-29.

of associates, each focused on the associate as potential partner.

It is, therefore, clear that the opportunity to progress from associate to partner is a "term, condition, or privilege," 42 U.S.C. §2000e-2(a), of employment as an associate. Title VII's broad mandate to eliminate employment discrimination clearly extends to promotional opportunities, at both lower-level and executive and managerial levels. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).[16/] In the instant case, promotion to the ranks of the firm's

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16/ See, e.g., Payne v. Travenol Labs, 673 F.2d 798 (5th Cir. 1982), cert. denied, 74 L.Ed.2d 605 (1983)(promotions to technical, managerial and executive level jobs); U.S. Postal Service Bd. of Governors v. Aikens, 51 U.S.L.W. 4354 (U.S. Apr. 4, 1983)(managerial positions); Sweeney v. Bd. of Trustees of Keene State College, 569 F.2d 169 (1st Cir.), vacated and remanded on other grounds, 439 U.S. 24 (1978), 604 F.2d 106 (1st Cir. 1979)(academic promotions); Gilmore v. Kansas City Terminal Railway Co., 509 F.2d 48, 51 (8th Cir. 1975)(managerial and supervisory positions); Pinckney v. County of Northampton, 512 F. Supp. 989 (E.D.Pa. 1981), aff'd, 681 F.2d 808 (3rd Cir. 1982)(administrative positions).

management carries with it other changes in the associate's position, such as security of tenure. These additional factors, however, which are present in many other managerial or executive-type promotions, do not alter the nature of the claim of employment discrimination. The associate has, under any circumstances, been part of an employment system that leads either to partnership or to unemployment, and is therefore entitled to the protection of Title VII. See Lucido v. Cravath, Swaine & Moore, 425 F. Supp. at 128.

C. Partnership Decisions are not Protected by the Freedom of Association

The Eleventh Circuit's conclusion that the anti-discrimination policies of Title VII are outweighed by the King & Spalding's partners' freedom of association misperceives the nature of that freedom and results in a perversion of clear Congression-

al intent to outlaw discrimination.

This Court has never recognized a right of association independent of other constitutional guarantees. One commentator described freedom of association as "little more than a shorthand phrase used by the Court to protect traditional first amendment rights of speech and petition as exercised by individuals in groups." Raggi, An Independent Right to Freedom of Association, 12 Harv. C.R.-C.L. L. Rev. 1 (1977). See also, Tribe, American Constitutional Law, 701-703 (1978); Young & Herbert, Political Association under the Burger Court: Fading Protection, 15 U. Cal. Davis L. Rev. 53, 54 n. 4 (1981). Although individual justices have tried to articulate a general notion of freedom of association independently deserving constitutional protection, see, e.g., Justice Marshall's dissent in Village of Belle Terre v. Boraas, 416 U.S. 1, 15-18 (1974) and Justice Douglas' con-

currence in United States Department of Agriculture v. Moreno, 413 U.S. 528, 540-45 (1973), this Court as a whole has tended to recognize freedom of association as being tied to some underlying First Amendment right. See, e.g., Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, 454 U.S. 290 (1981)(city ordinance placing limits on expenditures and contributions in campaigns on ballot measures violated citizens' groups' rights of political speech and association); Widmar v. Vincent, 454 U.S. 263 (1981)(if university makes facilities generally available to registered student groups, it may not discriminate on basis of content of speech against groups wishing to use facilities for religious worship and discussion).

Further, this Court has expressly and consistently held that discriminatory acts are not justifiable in the name of free association. As this Court held in Norwood

v. Harrison, 413 U.S. 455, 470 (1973):

> Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections.

And, even when recognizing a freedom of association for the purpose of expressing or advocating beliefs, this Court clearly has denied any unrestricted right to act on those beliefs. This principle, recognized as early as NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958), was recently reaffirmed in Runyon v. McCrary, 427 U.S. 160, 176 (1976). In Runyon, this Court held that requiring a private school, committed to the promotion of racial segregation, to admit black children did not infringe any freedom of association enjoyed by the school, the parents, or the children. As Justice Stewart wrote, the school's discriminatory practice could not be rationalized as a form of freedom of

association because a legally mandated open admissions policy would not affect the content of what was taught:

> [I]t may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that children have an equal right to attend such institutions. But it does not follow that the practice of excluding racial minorities from such institutions is also protected by the same principle. As the Court stated in Norwood v. Harrison, 413 U.S. 455, 'the Constitution ... places no value on discrimination,' id., at 469, and while '[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment ... it has never been accorded affirmative constitutional protections ...'

427 U.S. at 176.[17/]

Runyon involved the same issue of law presented in the instant case--whether

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17/ Cf. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258-59 (1964) (upholding constitutionality of the public accommodations provisions of Title II of the Civil Rights Act of 1964):

[footnote con't on following page]

it is a violation of the First Amendment freedom of association to apply an anti-discrimination statute to a commercial organization. This Court rejected the associational claim in Runyon for precisely the reason that it should be rejected here: no right or ability to advocate any point of view is infringed when a discriminatory promotional policy is invalidated. 427 U.S. at 176-77.

This Court has held that governmental policies intended to further a compelling

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[footnote con't from preceding page]

> The only questions are: (1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate. If they are, appellant has no 'right' to select its guests as it sees fit, free from governmental regulation.

See also Railway Mail Ass'n v. Corsi, 326 U.S. 88, 93-94 (1945)(due process does not prohibit state from banning racial discrimination in union membership).

state interest, like the anti-discrimination principles embodied in Title VII, may justify restrictions on associational interests. CSC v. Nat'l Assoc. of Letter Carriers, 413 U.S. 548 (1973)(restrictions on the associational rights of federal employees justified by interest in effective government); Buckley v. Valeo, 424 U.S. 1, 24-28 (1976)(limitations on the associational rights of campaign contributors justified by interest in avoiding actuality and appearance of political corruption). Acting in disregard of these principles, the Eleventh Circuit resolved the conflict between Title VII and rights of association by simply eliminating Title VII from its analysis.

Favoring the associational interst of King & Spalding over Congressional intent to bar discrimination in employment contorts the nature of the associational right and makes a mockery of Title VII. Without

question King & Spalding, in considering whether to make Elizabeth Hishon a partner, was making a business decision. See Jt. App. at 45-48 (affidavit of James Sibley). Assertions of constitutionally guaranteed associational rights of the law firm neither obfuscate the nature of the partnership decision nor transform it into a decision warranting constitutional protection. This Court's opinions suggest that the constitutional protection accorded political speech and association is not as great when applied to ordinary business activities. Compare In re Primus, 436 U.S. 412 (1978) (reversing a reprimand of an attorney who, on behalf of the American Civil Liberties Union, had solicited a client; distinguishing "traditional fee paying arrangements," and noting representation involved could not be viewed as "motivated by considerations of pecuniary gain rather than ... [the] goal of vindicating civil liberties,"

436 U.S. at 429-30); with Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978)(affirming disciplinary actions against an attorney who improperly solicited clients, noting that a "lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns."436 U.S. at 459).

Title VII prohibits sex discrimination in employment--it does not interfere with the exercise of discretion in the non-discriminatory selection of new partners. To hold otherwise is to adopt a view of the right of association which transcends all other considerations of law and the Constitution and which is wholly unsupported by this Court's previous rulings on the parameters of associational rights.

IV. TITLE VII'S APPLICATION TO PARTNERSHIPS AFFECTS MANY IMPORTANT SECTORS OF THE ECONOMY, NOT SIMPLY LAW FIRMS

An exception to Title VII for promotions in a partnership like King & Spalding would have an impact on industries and professions beyond law firms. In large part because of its malleability, partnership is a common form of business organization in this country. As this Court has noted, "some of the most powerful private institutions in the nation are conducted in the partnership form." Bellis v. United States, 417 U.S. 85, 93 (1970). In 1980, 1,379,654 businesses including roughly 8.4 million partners filed partnership tax returns with the Internal Revenue Service. Internal Revenue Service, Dept. of the Treasury, Statistics of Income-1980 Partnership Returns Table 1, p. 10 (1982) (hereinafter cited as Statistics of Income-1980). Use of the partnership configuration for a

business is growing. In 1979, 1,299,593 businesses filed partnership returns, Internal Revenue Service, Dept. of the Treasury, Statistics of Income-1979 Partnership Returns Table 1, p. 10 (1982) and in 1978, 1,234,157 did so. Internal Revenue Service, Dept. of the Treasury, Statistics of Income-1978 Partnership Returns Table 1, p. 8 (1982). These partnerships account for a significant amount of business. In 1980, for example, partnerships had total receipts of almost $300 billion, Statistics of Income-1980 Table 1, p. 10.

Partnerships can be found throughout all segments of the nation's economy. For example, in 1980, there were 8,228 partnerships of certified public accountants consisting of 53,274 partners, which earned $6.65 billion in receipts. Statistics of

Income-1980 Table 1, p. 18.[18] In addition, partnerships are widely used in the engineering and architectural fields (6,675 partnerships) id.; farming (108,094 partnerships), id. at 10; construction (66,590 partnerships), id. at 11; wholesale and retail trades (200,273 partnerships), id. at 13; insurance (7,127 partnerships), id. at 15; personal services, including laundries, beauty and barber shops (25,607 partnerships), id. at 17.

Because use of the partnership form of business organization permeates this nation's many professions and industries, a holding by this Court excluding partnerships from scrutiny under Title VII will

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[18] See supra Section II for discussion of the importance of the "Big Eight" certified public accounting firms. In addition, there were 4,783 partnerships of other accounting, bookkeeping and auditing services which included 12,564 partners and $505,000,000 total receipts. Statistics of Income-1980 Table 1, p. 18.

effectively exempt a large number of business organizations from the proscriptions of that Act. This is particularly disturbing at a time when the number of women partners in many of the above-mentioned fields continues to lag so significantly behind the increasing numbers of women entering these fields.[19/]

Public accounting firms, for example, are large employers of female certified public accountants. According to a recent

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[19/] Between 1980 and 1981, the number of women accountants doubled, resulting in an increase in the number of women accountants from 25.2% to 38.5% of the field. Bureau of Labor Statistics, U.S. Dept. of Labor, The Female-Male Earning Gap: A Review of Employment and Earnings Issues Table 5, p. 8 (Sept. 1982). Over the same period, the number of women engineers nearly tripled, resulting in a jump from 1.6% of all engineers being women to 4.3%. Id. In the five years from 1975 to 1980, the number of female architects doubled, so that women now comprise 6.7% of the field as compared with 4.3% in 1975. Greer, Women in Architecture: A Progress (?) Report and a Statistical Profile, AIA Journal, Jan. 1982, at 40 (hereinafter cited as Women in Architecture).

survey conducted by the American Woman's Society of Certified Public Accountants, 58% of its membership and that of the American Society of Women Accountants were employed in public accounting firms in 1981, almost 30% of which were national firms. American Woman's Society of Certified Public Accountants, A 1981 Statistical Profile of the Woman Certified Public Accountant (1981). Of these women, only 17.9% were partners in their firms, while 34.5% were considered non-supervisory. Id. The number of women partners in the "Big Eight" firms is even more dismal. As the New York Times reported in 1977, the "Big Eight" firms averaged fewer than three female partners each. More Women Moving into Public Accounting, But Few to the Top, N.Y. Times, Dec. 17, 1977, at 18. According to Forbes, in 1981 only one of the 125 new partners at Peat, Marwick, Mitchell was a woman, a pattern replicated throughout the "Big Eight."

Women accounted for three of Arthur Andersen's 168 new partners; three of Arthur Young's 57 new partners; none of Price-Waterhouse's 36 new partners; three of Deloitte Haskins and Sells' 64 new partners; one of Coopers & Lybrand's 70 new partners, two of Touche Ross' 58 new partners, and one of Ernst & Whinney's 75 new partners. Ms. CPA, Forbes, Aug. 17, 1981, at 8.[20/]

[20/] The attitudes that women in the "Big Eight" must fight against can be both vicious and entrenched, as illustrated by Stevens, supra p. 22 , at 22.

> 'They really were the good old days back when I was an active partner,' says a retired Big Eight auditor.... 'It was a gentleman's business, that's what I liked about it. Now, it's like the UN there.... You don't have anything in common with your partners... I just can't get used to it. I mean, in my day lunchtime was a relaxed affair. A good meal and good conversation with men of your own ilk. Now if you want to tell a joke, you have to look around the table first. One of your partners may be Negro, Spanish, a Jew, or a woman. You know how sensitive they are.'

In view of these facts, it is not surprising that the limited chance for promotions was one of the most frequent reasons given by the women accountants in the surveys described above for leaving their previous position. American Woman's Society of Certified Public Accountants, supra p. 58.

Similar patterns exist for women engineers and architects. For example, according to a 1982 survey of its membership conducted by the Society of Women Engineers, 62.4% of its members were employed in private industry, but roughly half had no regular supervisory responsibility. Only 8% served as managers or general managers. Society of Women Engineers, A Profile of the Woman Engineer 3, Table 2 p. 4, Table 7 p. 6 (1982). A survey conducted in 1981 by the American Institute of Architects Journal found that the majority of women archi-

tects were employed in architectural firms. Women in Architecture at 40. The survey results strikingly indicate a significant rise in the number of women who report being subject to discrimination in their work experience -- 56% in 1981 as compared with 40% in a similar survey conducted in 1974. Id. Of these victims of discrimination, 57% indicated they had suffered discrimination in advancement, 54% in work assignments and 51% in hiring. Many of the survey participants responded that it was difficult, if not impossible to move to managerial positions in some architectural firms.[21/] In the words of one woman, "It is extremely difficult to continue to grow

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21/ Many also commented that discrimination has detrimentally affected their sense of self esteem and self confidence, as one respondent said, "by having to re-prove myself in each new situation, rather than being accepted without questions as a competent professional. Women in Architecture, at 40.

within a firm in terms of management, scope of responsibility and salary. Most men become threatened when a woman gains competence in their areas." Id.[22/]

An exception to Title VII for promotions to partnership thus promises to shield more than just law firms from prohibitions against discrimination and reach

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[22/] Clearly, the sluggishness with which these fields have responded to the increased numbers of women has an impact beyond those women currently eligible to be considered as partners. Women at all levels feel the adverse effects of discrimination which continues at the top of their fields. Their opportunities to advance are hindered and the quality of their job experience may suffer as a consequence. See Jt. App. at 12-13 (Complaint ¶ 17); cf. Lucido v. Cravath, Swaine & Moore, 425 F. Supp. at 127 (alleged discrimination in work assignments based on religion and/or national origin). This leaves members of Title VII's protected groups unable to know whether they will be judged on their merit, after years of extended and expensive training and further years of long and hard work. It will tend to inhibit them from entering all professions, not simply law, in which partnerships are an important form of organization.

more than just those women currently eligible for consideration as partners. The lower court's decision clears the path for gross circumvention of the anti-discrimination proscriptions of Title VII by partnerships and should not be sanctioned by this Court.

CONCLUSION

For the reasons set forth above, the decision of the United States Court of Appeals for the Eleventh Circuit should be reversed.

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APPENDIX

DESCRIPTIONS OF AMICI CURIAE

The American Association of University Women ("AAUW") is a national organization of 190,000 college-educated women working for the advancement of women. Dedicated for 100 years to promoting the social and economic well being of all persons, the AAUW affirms its commitment to equal employment opportunity for women and men.

The American Society of Professional and Executive Women supports equal opportunity in all career paths. It deplores the continuity of exclusionary practices that curtail the achievements and contributions of women. The organization is committed to fostering positive career goals and attitudes, and recognizes the importance of this case in the application of Title VII to partnerships to affect many facets of American enterprise.

Connecticut Women's Educational and Legal Fund, Inc. ("CWEALF") is a non-profit public interest law firm specializing in cases of sex discrimination. Since its inception in 1974, CWEALF has represented plaintiffs in numerous employment discrimination cases and has also been active in educating women about their legal rights in the workplace. CWEALF is strongly interested in maintaining Title VII as a broad remedial statute against employment discrimination.

Equal Rights Advocates, Inc., is a San Francisco based, public interest legal and education corporation specializing in the area of sex discrimination. It has a long history of interest, activism and advocacy in all areas of the law which affect equality between the sexes. Equal Rights Advocates, Inc. has been particu-

larly concerned with gender equality in the work force because economic equality is fundamental to women's ability to achieve equality in other aspects of society.

The National Bar Association, Women Lawyers' Division, founded in 1925, is a professional membership organization which represents more than 10,000 Black attorneys, judges, and law students. Its purposes include achieving equal opportunities for minorities in the legal profession and protecting the civil and political rights of all citizens. To effectuate its goal of racial and sexual equality, the National Bar Association, through its Women Lawyers' Division, has been actively involved in issues concerning equal employment opportunities.

The National Women's Law Center is a legal organization, located in Washington, D.C., with the purpose to protect and advance women's rights. The Center repre-

sents women's concerns before federal administrative agencies and courts. The Center has been involved in a wide range of issues affecting the employment rights of women.

The Northwest Women's Law Center is a local non-profit organization that seeks to promote the rights of women through the law. The Center is concerned with the issue of sex discrimination and its total elimination from the work environment. The Center actively works to educate both women and employers throughout the Pacific Northwest about the effects of sex discrimination, the rights of women who are discriminated against, and what employers can do to eliminate discrimination from the workplace.

The NOW Legal Defense and Education Fund ("NOW LDEF") is a non-profit civil rights organization that performs a broad range of legal and educational services nationally in support of women's efforts

to eliminate sex-based discrimination and secure equal rights. NOW LDEF was established in 1970 by leaders of the National Organization for Women, a membership organization of over 190,000 men and women in more than 700 chapters throughout the United States. A major goal of the NOW LDEF is eliminating barriers that deny women economic opportunities.

Women's Equity Action League ("WEAL") is a national membership organization dedicated to securing legal and economic rights for women. WEAL's membership is committed to the full implementation of employment discrimination laws, and in particular the application of Title VII of the Civil Rights Act of 1964 to the full range of employment decisions affecting women.

The Women's Law Project is a non-profit feminist law firm dedicated to eliminating sex discrimination through litigation and public education. Since its founding

in 1973, the Women's Law Project has been concerned with institutional barriers to the advancement of women at all levels of employment. Because of its primary focus on achieving results beneficial to women through the legal system, the Women's Law Project has a special interest in the employment opportunities of women in the legal community, and believes that the protections of federal law are an essential component of achieving equal opportunity within the legal profession.

Women's Legal Defense Fund is a non-profit, tax exempt membership organization, founded in 1971 to provide pro bono legal assistance to women who have been discriminated against on the basis of sex. The Fund devotes a major portion of its resources to combatting sex discrimination in employment, through litigation of significant employment discrimination cases, operation of an employment discrimination

counselling program, public education, and agency advocacy before the EEOC and other federal agencies that are charged with enforcement of equal opportunity laws.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ELIZABETH ANDERSON HISHON,

Petitioner,

—v.—

KING & SPALDING,

Respondent.

ON CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE*

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization of over 250,000 members which is dedicated to protecting the fundamental rights of the people of the United States, including the right to equal treatment under the law. One of the major civil liberties issues still facing the United States is the elimination of all vestiges of racism and sexism, and the wholly justified demand of women and minorities for access to opportunities from which they have so long been excluded.

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* The parties have consented to the filing of this brief, and their letters of consent are being filed with the Clerk of Court pursuant to Rule 36.2 of the Rules of this Court.

In numerous cases before this Court, the ACLU has challenged discrimination against minorities and women under the Fifth and Fourteenth Amendments, and has also urged the full enforcement of Title VII of the Civil Rights Act of 1964 to remedy the causes and effects of such prohibited and invidious discrimination.

The ACLU has been in the forefront in the defense of First Amendment Rights, including the right to freedom of association which amicus believes is incorrectly asserted by the respondent in this case.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case in the Brief of Petitioner.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

The only issue necessarily before this Court is whether the decision of a large, institutionalized law firm to decline to promote one of its associates to partnership on the basis of the employee's race, sex, religion or national origin and, by force of the firm's no "permanent associate" policy, to discharge such employee falls within the purview of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq. (hereinafter "Title VII" or "Act"). In the view of amicus and in accord with the only lower court decision on point, Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123 (S.D.N.Y. 1977), such a decision would constitute both discrimination with respect to that associate's "terms, conditions, or privileges of employment" within the meaning of Section 703(a)(1) and the deprivation of a significant

"employment opportunit[y]" within the meaning of Section 703(a)(2) of the Act. §§ 703(a)(1)(2), codified at 42 U.S.C. § 2000e-2(a)(1)&(2).[1] This case does not necessarily present the related questions of whether partners are themselves "employees" under the Act; whether the relations inter se among partners are subject to the antidiscrimination strictures of the Act; or whether a decision to hire partners from outside the firm falls within the Act's coverage.

---

1. 42 U.S.C. § 2000e-2(a)(1)&(2) provide:

> (a) It shall be an unlawful employment practice for an employer -
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would

(footnote continued on following page)

SUMMARY OF ARGUMENT

1. Whether or not partners are "employees" under Title VII or the relations inter se among partners are subject to its strictures, proper construction of Title VII requires the conclusion that a large, institutionalized law firm's discriminatory refusal to promote an associate to partnership constitutes discrimination with respect to "terms, conditions, or privileges of employment" and discriminatory denial of "employment opportunities" within the meaning of Section 703(a) of the Act, 42 U.S.C. 2000e-2(a)(1)&(2). The language, structure, legislative history and judicial construction of the Act make clear that Congress intended a broad,

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(footnote continued from preceding page)
deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

comprehensive antidiscrimination principle applicable to virtually every sector of employment in our country and to every level of employment within the operations of employers having fifteen or more employees. The inclusive sweep of the statute,with exemptions from coverage few in number and narrow in scope, cannot be squared with judicial recognition of implied exclusions from coverage. The history of the 1972 amendments, including Congress' rejection of a bill to exempt hospitals with respect to the selection of physicians and surgeons, further confirms the comprehensive scope of the Title VII antidiscrimination principle.

For many young lawyers emerging from law school, employment with a large private firm is the only viable career plan. The opportunity to be selected for partnership is the principal "employment con-

dition" or "employment opportunity" such firms offer. To insist on nondiscrimination at the entry level while withholding Title VII scrutiny with respect to partnership promotion decisions is to deny protection when it is most needed, when careers hang in the balance. Courts have insisted on Title VII oversight in the analogous context of the tenure decisions by colleges and universities. Congress has insisted on Title VII oversight in the analogous context of selecting senior physicians and surgeons to staff the nation's hospitals. No basis whatever exists to exclude the legal profession from the nation's commitment to eradicate discrimination from the workplace.

None of the reasons advanced below by respondent for excluding the partnership promotion decision from Title VII scrutiny withstands analysis. Decisional law makes clear that promotion, even if

coupled with a proprietary interest, remains a covered employment condition or employment opportunity. Moreover, even if partners are not themselves "employees" under Title VII, the decision whether or not to promote a conceded employee to an arguably exempt position remains within the purview of the Act. Finally, the unanimous consent requirement of state law and the partners' liability for partnership obligations offer no basis for a total exclusion from coverage.

2. In view of the broad reach of Title VII, Congress' explicit provision for legitimate claims of associational privacy, and the absence of any serious constitutional objection, there is no basis in this case for resorting to extraordinary techniques of statutory construction, including the so-called "clear statement" rule. The essential predicates for the "clear statement" technique, a

statute capable of two or more "fairly possible" constructions, a failure on Congress' part to consider the constitutional question, and the presence of a "serious doubt of constitutionality", are wholly absent in this case. Indeed, when measured against this Court's associational privacy decisions, including the claim rejected in Runyon v. McCrary, 427 U.S. 160 (1976), the claim of a large law firm to be exempt from the law's command that it not discriminate on grounds demeaning to individual dignity borders on the frivolous.

3. In any event, the Court should reverse the judgment below and remand for further discovery as to whether newly selected or junior partners occupy a status in fact more closely resembling an employee than a co-owner. In light of the truncated discovery below and the dearth of systematic knowledge as to the

actual workings of law firms, the Court of Appeals was plainly wrong in affirming the dismissal of the complaint when it had no basis for knowing what role junior partners in fact play in profit participation and governance at respondent law firm.

ARGUMENT

I. PROPER CONSTRUCTION OF TITLE VII REQUIRES THE CONCLUSION THAT A LARGE, INSTITUTIONALIZED LAW FIRM'S DISCRIMINATORY REFUSAL TO PROMOTE AN ASSOCIATE TO PARTNERSHIP CONSTITUTES DISCRIMINATION WITH RESPECT TO "TERMS, CONDITIONS, OR PRIVILEGES OF EMPLOYMENT" AND DISCRIMINATORY DENIAL OF "EMPLOYMENT OPPORTUNITIES" WITHIN THE MEANING OF SECTION 703(a)

The language, structure, legislative history and judicial construction of Title VII make plain the conclusion that Congress intended broad, comprehensive application of the antidiscrimination principle to all sectors of employment in our country. Only last term, in Sumitomo Shoji America,

Inc. v. Avigliano, 102 S.Ct. 2374, (1982), this Court unanimously rejected the claim of an American subsidiary of a Japanese company that a treaty privileged it to hire only male Japanese citizens to fill executive, managerial and sales positions. In this case, where no argument based on treaty or foreign policy considerations is possible, the Court should reject respondent's attempt to carve out an implied exclusion from the Act's sweep. Under prior rulings of this Court and the lower courts, even if partners of a law firm are not themselves "employees" under Title VII, the promotion of associates who are concededly employees to such arguably exempt positions may not be denied on grounds proscribed by the Act. A contrary interpretation of the Act confers an immunity on businesses operating in the partnership form to withhold

important employment opportunities from conceded employees on the basis of race, color, religion, sex or national origin -- ironically, in this context, a license for law firms to operate outside of the law.

A. The Language, Structure and Legislative History of Title VII Make Evident the Broad, Comprehensive Sweep of Congress' Determination to Eradicate Discrimination in All Employment Settings, and Preclude Judicial Recognition of Implied Exclusions from Coverage.

Title VII establishes a comprehensive antidiscrimination principle to virtually every sector of employment in our country and to every level of employment within the operations of employers having fifteen or more employees. Congress took care in Section 701(a) to include within the meaning of covered "person" (and thereby covered "employer"), "partnerships" and "legal representatives"

as well as "governments, governmental agencies, political subdivisions, labor unions, ... associations, corporations, ... mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in [bankruptcy] cases under Title II, or receivers." 42 U.S.C. § 2000e(a). Exemptions from statutory coverage are few in number and narrow in scope. Under Section 701(f), the term "employee" is broadly defined to reach any "individual employed by an employer," with only a narrow exemption for persons elected to public office in state and local government and their appointees with policymaking responsibility and top-level advisers. 42 U.S.C. §2000e(f).

The reach of Title VII's antidiscrimination principle emerges most clearly when a comparison is drawn with the other major federal statute governing

employment relations, the Labor-Management Relations Act (or Taft-Hartley Act) of 1947, as amended, 29 U.S.C. §151, et seq. (hereinafter "Taft-Hartley Act"). Unlike the Taft-Hartley Act, Title VII lacks an exclusion for supervisory employees or managerial and top-level policymaking personnel. NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974). Title VII extends to supervisory, managerial and policy-making employees because Congress determined that discrimination on the basis of race, color, religion, sex, or national origin should not block access to such positions, and no legitimate prerogative of the employer is sacrificed by adherence to the non-discrimination principle.

The 1972 amendments to Title VII further confirm the comprehensive reach of the Act. Congress, in 1972, narrowed the exclusion for small firms from twenty-five to fifteen employees, 42 U.S.C.

§ 2000e(b). The exclusion for employees of state and local governments was eliminated. Pub. L. No. 92-261, § 2(2), 86 Stat. 103 (codified as amended at 42 U.S.C. § 2000e(b)). In addition, Congress deleted the exemption for employees of educational institutions, noting the importance of removing barriers to the advancement of black and female scholars on college and university faculties. See H.R. Rep. No. 238, 92nd Cong., 1st Sess. 19 (1971). Even more revealing is Congress' rejection of a proposed amendment, introduced by Senator Ervin, to exempt public and private hospitals with respect to the selection of physicians and surgeons. Senator Williams, a principal manager of the 1972 amendments, responded in debate:

> We have seen, during the debate on [this bill] S.2515, that minorities and women have been, and continue to be, denied access to high-level

> and professional job categories. The medical profession, I regret, offers no exception to this pattern of discrimination.

118 Cong. Rec. 3800 (1972)(remarks of Sen. Williams). Senator Williams then yielded to Senator Javits, another floor leader, who urged rejection in the strongest of terms:

> One of the things that those discriminated against have resented the most is that they are relegated to the position of the sawers of wood and the drawers of water; that only the blue collar jobs and ditchdigging jobs are reserved for them; and that though they built America, and certainly helped build it enormously in the days of its basic construction, they cannot ascend the higher rungs in professional and other life .... Yet this amendment would go back beyond decades of struggle and of injustice, and reinstate the possibility of discrimination on grounds of ethnic origin, color, sex, religion -- just confined to physicians or surgeons, one of the highest rungs of the ladder that any member of a minority could attain -- and thus lock in and

> fortify the idea that being a doctor or a surgeon is just too good for members of a minority, and they have to be subject to discrimination in respect of it, and the Federal law will not protect them.
>
> This would be most iniquitous. I simply cannot believe that in this year it would be seriously entertained as a possibility by way of exemption from this bill.
>
> I hope very much, almost in self-respect, that the Senate will decisively reject this amendment.

118 Cong. Rec. 3802 (1972)(remarks of Sen. Javits).

As Senator Javits noted, assuring access to "the highest rungs of the ladder" is critical to an effective assault on discrimination in the work-place. For this Court to affirm the judgment of the Court of Appeals below would be to risk the denial of equal access to "the highest rungs of the ladder" in the legal profession for years to come, merely because the legal

profession is generally organized in partnership form.[2]

Only last term in Sumitomo Shoji America, Inc. v. Avagliano, 102 S.Ct. 2374 (1982), this Court unanimously rejected the argument of a locally incorporated, wholly-owned subsidiary of a Japanese corporation that treaty and foreign policy considerations mandated an implied immunity from Title VII scrutiny with respect to its decision in filling executive, managerial and sales positions.

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2. A recent survey of major law firms revealed that although modest progress has occurred in the hiring of associates, of 4,271 partners in 1981, women accounted for 2.8 percent, blacks for 0.5 percent, and Hispanics for 0.3 percent. Burke & Johnson, More Women on the Way Up, 3 Nat'l Law J. 1, 10 (April 20, 1981). The history of discriminatory exclusion in the legal profession is usefully recounted in C.F. Epstein, Women in Law (1981); C.P. Clark, Minority Opportunities for Blacks, Puerto Ricans and Chicanos (1974); J. Auerbach, Unequal Justice (1976). For the problems faced by a young lawyer seeking employment with respondent King & Spalding, see M. Abrams, The Day Is Short 62, 95 (1982).

Respondent's argument in this case for an implied exclusion stands on far weaker ground. There is simply no basis for finding in this statute implied exclusions from coverage.

B. In the Context of Employment in a Large Law Firm, the Opportunity to "Make Partner" Is the Quintessential Condition of Employment or Employment Opportunity.

In an era in which "hanging a shingle" is rarely a viable option, employment with a law firm leading to partnership is a principal career pattern available to young legal professionals. The opportunity to be "made a partner" after a period of apprenticeship is the principal employment condition or employment opportunity law firms can offer. Law firms are well aware of this when they interview at law schools and often adjust their policies on lateral hiring and salary, see

Nelson, Practice and Privilege: Social Change and the Structure of Large Law Firms, 1981 Am. Bar Fndn. Res. J. 97, 126, to reflect the likelihood of being able to award partnership at the end of the apprenticeship. No one joins a major law firm with the expectation of remaining an associate, and normatively the profession does not regard permanent associate status as an appropriate final status.

Excluding the partnership promotion decision from the purview of the Act is tantamount to depriving the employed professional lawyer of protection against discrimination when it is most needed, when careers hang in the balance. It would be tantamount to saying in the higher education context that there shall be no discrimination in hiring academics, but all bets are off when the tenure decision is made. Though mindful

of the evidentiary difficulties of applying Title VII to higher-level professional jobs, the courts have declined to immunize the tenure decisions of university faculties and administrations from Title VII scrutiny.[3] They have properly declined to hold out the promise of nondiscriminatory employment opportunity at the entry level while withholding Title VII review of tenure promotion decisions. The same course is required in the context of employment in the legal profession.

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3. See generally, Yurko, Judicial Recognition of Academic Collective Interests: A New Approach to Faculty Title VII Litigation, 60 B.U.L.Rev. 473 (1980); Waintroob, The Developing Law of Equal Employment Opportunity at the White Collar and Professional Level, 21 Wm. & Mary L. Rev. 45 (1979); Note, Title VII on Campus: Judicial Review of University Decisions, 82 Colum. L. Rev. 1206 (1982); Note, Tenure and Partnership as Title VII Remedies, 94 Harv. L. Rev. 457 (1980).

C. Respondent Offers No Basis for a Statutory Construction Excluding the Partnership Promotion Decision from Title VII Scrutiny.

The Court of Appeals below was fatally in error in stating that petitioner could not prevail because it "cannot find the requisite congressional intent to permit Title VII's intervention into matters of voluntary association." Pet. for Writ of Cert., App. A, at A-6. In view of the comprehensive scope of Title VII, offering no ground for judicial recognition of implied exclusions from coverage, and the obvious centrality of the partnership promotion decision to the employed professional lawyer, it is respondent's burden to offer this Court a proper basis for excluding that decision from Title VII scrutiny.

From what can be gleaned from respondent's assertions below, the argument appears to be that the partnership promotion decision is different from other

employment opportunities in that (1) it is often coupled with a proprietary interest in the firm, (2) the individual promoted to partner no longer remains an employee, (3) state law often requires the unanimous consent of all partners before a new one can be made, and (4) partners are personally liable for the actions of their co-partners. None of these grounds provides support for respondent's position.[4]

1. Proprietary Interest

There is no reason logically why a promotion decision loses its character as an employment condition or employment opportunity within the meaning of Title VII simply because the promotion is coupled with a proprietary interest in the firm. As this Court stated in Goldberg

4. Any claim based on the associational privacy interests of large, institutionalized law firms will be treated in Point II, infra.

v. Whitaker House Coop., 366 U.S. 28, 32 (1961), "[t]here is nothing inherently inconsistent between the coexistence of a proprietary and an employment relationship." Thus, most recently in Bonilla v. Oakland Scavenger Co., 697 F.2d 1297 (1982), the Ninth Circuit invalidated a firm's shareholder preference plan that assigned the better jobs to shareholder-employees, who were exclusively of Italian ancestry and were either members of the family or close friends of current shareholders. Judge Farris' analysis is particularly pertinent here:

> The Company argues that Title VII has no application to discrimination in the sale of corporate stock. Even if this is so, however, it does not help the Company's position here. Since the Company ties preferential wages, hours, and job assignments to ownership of its stock, the shareholder preference plan constitutes a condition of employment subject to the mandate of Title VII. The Company's organiztion closely entangles stock ownership and employment privilege, but the predominant characteristics are

those of employment.

Id. at 1302. Employment characteristics predominated because shareholder-employees agreed to serve as full-time employees and stock ownership was not freely transferable.[5]

2. Promotion to an Exempt Position

Even if one assumes arguendo that under no circumstances can a partner be an "employee" for Title VII purposes (a highly doubtful assumption), it nonetheless remains clear that while the individual remains a statutory employee, promotion, even to a position exempt from

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5. See Pettway v. American Cast Iron Pipe Company, 494 F.2d 211, 264-66 (5th Cir. 1974), where the court held that the opportunity to serve on the Board of Operatives and to influence management by voting employee shares held by the Board was so connected to employment that black employees could not be excluded.

statutory coverage, may not be denied on grounds that violate the laws governing the treatment of employees. In Golden State Bottling Co. v. NLRB, 414 U.S. 168, 187-89 (1973), this Court unanimously sustained the agency's backpay order for a period subsequent to the time the discriminatee would have become an independent contractor exempt from coverage under the Taft-Hartley Act. The Court, id. at 188, relied on the Second Circuit's opinion in NLRB v. Bell Aircraft Corp., 206 F.2d 235, 237 (1953), in which Judge Chase stated:

> But, even if we assume, arguendo, that an applicant for a supervisory position who was not already an employee of this particular employer would not have been a protected employee under the Act, it does not follow that Finch was similarly not protected. At the time the discrimination took place, he was clearly a protected employee, and his prospects for promotion were among the conditions of employment. The Act protected him so long as he held a nonsupervisory position, and it is immaterial that the protection thereby afforded was calculated

> to enable him to obtain a position in which he would no longer be protected.

See Oil, Chemical & Atomic Workers v. NLRB, 547 F.2d 575, 579 (D.C. Cir. 1976), cert. denied, 431 U.S. 966 (1977).

Respondent contended below that protecting the promotion decision under Title VII without imposing full Title VII strictures on all aspects of the relationship between partners inter se would constitute a futile exercise of judicial authority, since an employer bent on discrimination might promote an associate to partnership and promptly dismiss the newly-minted partner. However, where a post-promotion act of discrimination against a partner is a pretext to avoid the command of Title VII, courts possess ample authority to look through such a shabby ploy and enforce the Act.

3. Unanimous Consent Requirement

There is no conflict between the command of Title VII and any state-law requirement that admission to partnership requires the unanimous consent of all existing partners. See Lucido v. Cravath, Swaine & Moore, 425 F. Supp. at 129. Title VII merely forbids reliance on certain discriminatory criteria in withholding consent. In any event, if there is any inconsistency, Title VII clearly enjoys preemptive force. 42 U.S.C. § 2000e-7.

4. Responsibility for Partnership Obligations

Although it is true that partners are personally liable for all partnership obligations, and every partner is an agent of the partnership for the purpose of its business,[6] it is not clear

6. Some acts are not within the apparent
(footnote continued on following page)

why this provides a basis for a blanket exemption from Title VII. At most, it argues that the partnership selection process must be carefully undertaken, and that reviewing courts should decide Title VII challenges to partnership denials with a sensitivity for legitimate, non-discriminatory performance criteria. The fact that difficult evidentiary issues will arise in the context of Title VII challenges involving high level positions is not a justification for abdicating responsbility in an area. See Bartholet, Application of Title VII to Jobs in High Places, 95 Harv. L. Rev. 945 (1982).

(footnote continued from preceding page) authority of a partner or are deemed unauthorized under the Uniform Partnership Act. See J.A. Crane & A.R. Bromberg, Crane and Bromberg on Partnership §§ 51-52 (1968). In addition, the partnership agreement can restrict the authority of particular partners and such restrictions are effective between partners and binding on third parties having notice thereof. See id. § 53.

II. IN VIEW OF THE BROAD REACH OF TITLE VII, CONGRESS' EXPLICIT PROVISION FOR CLAIMS OF ASSOCIATIONAL PRIVACY, AND THE WEAKNESS OF ANY CONCEIVABLE CONSTITUTIONAL OBJECTION ASSERTABLE BY RESPONDENT, THERE IS NO BASIS IN THIS CASE FOR RESORTING TO EXTRA-ORDINARY TECHNIQUES OF STATUTORY CONSTRUCTION, INCLUDING THE "CLEAR STATEMENT" RULE.

Respondent is ultimately driven to make a constitutional argument of sorts, but it is not a frontal challenge to the constitutionality of Title VII as applied to a law firm of the size and influence of King & Spalding. Rather, respondent argues that Title VII should be given other than its natural meaning in the service of a constitutional right of undefined origin and scope to choose one's business partners free of government regulation. However, the breadth of Title VII, Congress' explicit consideration of legitimate associational privacy interests, and the absence of any serious constitutional issue preclude resort to

extraordinary techniques of statutory interpretation, including the so-called "clear statement" rule.

A. The Essential Predicates for the "Clear Statement" Rule are (1) a Statute Capable of Two or More "Fairly Possible" Constructions, (2) A Failure on Congress' Part to Consider the Constitutional Claim, and (3) the Presence of "a Serious Doubt of Constitutionality".

As this Court stated in Crowell v. Benson, 285 U.S. 22, 62 (1932), and reaffirmed in International Association of Machinists v. Street, 367 U.S. 740, 749-50 (1961):

> When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.

The theory behind the "clear statement" rule is that where a statute poses

a "serious doubt of constitutionality" and "fairly" admits of an alternative reading not raising the question, the Court should opt for the latter interpretation in the interest of avoiding unnecessary constitutional adjudication and of assuring that Congress consciously focused on the constitutional issue in advance of constitutional adjudication.[7] Where a "serious doubt" of constitutionality is absent, there is no basis for bypassing the usual rules for reading statutes. Even where such a question is present, where the statute does not "fairly" admit of an alternative reading, the Court enjoys

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7. See A. Bickel, The Least Dangerous Branch 165-66 (1962); Estreicher, Judicial Nullification: Guido Calabresi's Uncommon Common Law for a Statutory Age, 57 N.Y.U.L. Rev. 1126, 1150-53 (1982); Neuborne, Separation of Powers and Judicial Review in France and the United States, 57 N.Y.U.L. Rev. 363, 419-421 (1982).

no warrant to render a forced, distorted reading. And even if these predicates are met, if Congress has in fact focused on the constitutional question in passing the earlier measure, there is no justification for repeating the dialogue.

B. Title VII's Comprehensive Scope and Congress' Consideration of Associational Privacy Interests Preclude Resort to "Clear Statement" Techniques.

Much has already been said in Point I,A, about Title VII's broad, comprehensive antidiscrimination sweep. When proper weight is given to language, structure, and legislative history, this is not a statute which permits of repair carpentry in the form of judicially implied exclusions. Moreover, since Congress has already focused on and made provision for what it found to be legitimate associational privacy in-

terests, this Court must accept such definitive declaration of congressional intention. In excluding from coverage small firms -- reduced from twenty-five employees to fifteen employees in 1972 -- Congress sought not only to meet Commerce Clause authority objections but also to advance privacy concerns. As Senator Humphrey, one of the principal managers of the proposed legislation, stated on the floor of the Senate, when firms have more than twenty-five employees, "[t]hey also lose most of whatever intimate, personal character they might have had." 110 Cong. Rec. 13088 (1964)(remarks of Sen. Humphrey). In other provisions as well, the exemptions for religious organizations and for bona fide private membership clubs, Congress made clear that Title VII was enacted with full appreciation of po-

tential associational privacy claims.[8]

C. Any Constitutional Objection to Extending Title VII to the Partnership Promotion Decisions of Large, Institutionalized Law Firms Borders on the Frivolous.

To appreciate the weakness of respondent's constitutional claim, the precise scope of the issue before this Court bears repeating. This case does not necessarily present questions of whether partners are themselves "employees" within the purview of Title VII; whether the relations inter se among partners are governed by Title VII; or whether the decision to hire partners from outside the firm is sub-

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8. Intimacy and privacy concerns also inform the exemptions in Title II and Title VIII of the 1964 Civil Rights Act. See generally Note, Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments, 74 Colum. L. Rev. 449, 491 and nn. 255, 256 (1974).

ject to Title VII strictures. Moreover, in the context of a facial challenge to Title VII coverage, no issue is raised as to whether the statute may constitutionally be applied to a law firm organized to propagate an ideology at variance with Title VII or to a firm peculiarly vulnerable to official harassment. Cf. Brown v. Socialist Workers '74 Campaign Committee, 51 U.S.L.W. 4015 (U.S. Dec. 8, 1982). In short, any constitutional doubt here must relate to the application of Title VII to partnership promotion decisions of a large, institutionalized law firm servicing clients across the country.[9]

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9. Respondent conceded below that "it derives a substantial portion of its total fees from clients who reside or have their principal place of business outside the State of Georgia and...that, in performing legal services for these clients and for its clients within the (footnote continued on following page)

This Court has never extended affirmative constitutional protection to the discriminatory preferences of major actors in the commercial and professional life of our country; indeed, only a single concurring opinion in 1964 suggests the possibility of doing so.[10] As stated in Norwood v. Harrison, 413 U.S. 455, 469-70 (1973):

> "although the Constitution does not proscribe private bias, it places no value on discrimination as it does on the values inherent in the

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(footnote continued from preceding page) State of Georgia, lawyers who are members of or are employed by this defendant make numerous trips to points outside of Georgia." Joint Appendix (hereafter "J.A.") 141. Its argument "that it is not a person engaged in an industry affecting commerce is based upon the fact that the provision of legal services is a 'profession,' not an 'industry.'" Id. at 246. But see Goldfarb v. Virginia State Bar, 421 U.S. 773, 785-88 (1975).

10. See Bell v. Maryland, 378 U.S. 226, 313 (1964) (Goldberg, J., concurring).

> Free Exercise Clause. Invidious private discrimination...has never been accorded affirmative constitutional protections."

Rejecting the claim of a labor union, also a private, unincorporated membership association, to be free of a state law proscription of racial discrimination, Justice Frankfurter signaled his agreement with the majority, noting that while a state may tolerate private discrimination, "[t]o use the Fourteenth Amendment as a sword against...State power [prohibiting discrimination] would stultify that Amendment." Railway Mail Association v. Corsi, 326 U.S. 88, 98 (1945) (Frankfurter, J. concurring); see id. at 93-94 (majority opinion). Reluctant, as Justice Frankfurter was, to dignify a claim devoid of constitutional substance," id. at 98, we nonethless offer some additional elaboration.

Presumably any constitutional claim of a right to discriminate in partnership promotion would be founded on the right of association held to be implicit in the First Amendment and a more general right of privacy derived from the broad command of the Due Process Clause of the Fourteenth Amendment. As Professor Tribe has noted, there is a "dual character" to such claims of associational right:

> But rights to associate with X are necessarily rights to dissociate from Y....[T]he right of one person or group to exclude others is inevitably a limitation upon the freedom -- including the associational freedom -- of those others.

L. Tribe, American Constitutional Law §§15-18, at 974 (1978). A claim of associational right, where it is not tied to independent First Amendment concerns, is, in essence, a claim of autonomy, to be free of the regulatory

reach of the law. Religious groups, relying on the affirmative sanction of the Free Exercise Clause, will on occasion successfully press such claims. Even in that context, however, "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." United States v. Lee, 455 U.S. 252, 261 (1982) (sustaining the imposition of social security taxes on an Amish carpenter employing other Amish). It is a claim that courts may honor with respect to affairs of the heart or soul in the sanctity of the home or other intensely private settings. Cf. Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965). It is not a claim, however,

that readily permits extension to the business and employment decisions of entities operating in the commercial world.[11]

Perhaps the case closest on point, and indeed one presenting a much stronger claim of associational privacy than does respondent, is Runyon v. McCrary, 427 U.S. 160 (1976). The case involved a private school's claim to be free of the antidiscrimination principle of a Reconstruction-era civil rights statute, 42 U.S.C. §1981. Rejecting the claim of a right to discriminate based on freedom of association, the Court made clear that no First Amendment privilege to espouse particular views was infringed by insistence on nondiscrimina-

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11. See generally Note, Federal Power to Regulate Private Discrimination, supra, 74 Colum. L. Rev. 449, 520-24 (1974).

tory access to the school:

> From this principle it may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions. But it does not follow that the practice of excluding racial minorities from such institutions is also protected by the same principle.

427 U.S. at 176 (emphasis in original). Turning to the right of privacy claim, the Court noted that prohibiting "a private school's adherence to a racially discriminatory admissions policy...does not represent governmental intrusion into the privacy of the home or a similarly intimate setting," and that parents "have no constitutional right to provide their children with private school education unfettered by reasonable government regulation." Id. at 178.

If parents in Runyon v. McCrary were unable to articulate a persuasive

associational claim to be free from a Congressional prohibition on racial discrimination, surely the partners in a large and influential law firm cannot advance a serious claim to such an exemption.

III. IN THE ALTERNATIVE, THE COURT SHOULD REVERSE THE JUDGMENT BELOW AND REMAND FOR FURTHER DISCOVERY AS TO WHETHER NEWLY SELECTED OR JUNIOR PARTNERS OCCUPY A STATUS IN FACT MORE CLOSELY RESEMBLING THAT OF EMPLOYEE THAN CO-OWNER.

Even if the Court rejects our submission that the strength of the legislative history and weakness of respondent's constitutional argument require outright reversal, the judgment of the Court of Appeals should still be reversed, and the case be remanded for further discovery and trial as to actual participation of newly selected or junior partners in the profits and governance of respondent law firm. In view

of the truncated discovery below and the paucity of systematic knowledge about the actual workings of major law firms, no one can say with confidence what role junior partners in fact play in profit participation and governance in major firms. It may be the case, whether formally or as a matter of practice, that junior partners are more "income partners" than "equity partners." Since this may well bear on the question of whether promotion to such positions comes within the ambit of Title VII, the Court of Appeals was plainly wrong in broadly ruling that "Title VII does not apply to those decisions dealing with the formation of partnerships," Pet. for Writ of Cert., App. A, at A-14, and in affirming dismissal of the complaint.

CONCLUSION

For all of the foregoing reasons, amicus submits that the judgment of the Court of Appeals should be reversed.

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IN THE

Supreme Court of the United States

October Term, 1982

ELIZABETH ANDERSON HISHON,

Petitioner,

vs.

KING & SPALDING,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH AND THE AMERICAN JEWISH CONGRESS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Is the decision to promote an attorney to partnership at a large institutional law firm organized as a partnership subject to Title VII of the Civil Rights Act of 1964 and thus one which must be made without regard to race, sex, religion or national origin?

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Note, *Tenure and Partnership as Title VII Remedies*, 94 Harv. L. Rev. 457 (1980) 17

No. 82-940

In The

Supreme Court of the United States

October Term, 1982

ELIZABETH ANDERSON HISHON,

Petitioner,

vs.

KING & SPALDING,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH AND THE AMERICAN JEWISH CONGRESS

The Anti-Defamation League of B'nai B'rith and the American Jewish Congress respectfully submit that the judgment of the United States Court of Appeals for the Eleventh Circuit in the above-captioned case should be reversed.

Petitioner and Respondent have consented to the filing of this brief and their letters of consent will be filed with the Clerk of the Court.

INTEREST OF THE *AMICI CURIAE*

The Anti-Defamation League of B'nai B'rith (ADL) was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. The Anti-Defamation League is vitally interested in protecting the civil rights of all persons, and in assuring that every individual receives equal treatment under the law regardless of his or her race, religion or ethnic origin.

The American Jewish Congress, which was founded in 1918, is a membership organization of American Jews dedicated to the elimination of racial, religious and sexual discrimination from American life and to the protection of the civil rights of Jews and of all Americans.

Among their many other activities directed to these ends, the Anti-Defamation League and the American Jewish Congress (AJC) have in the past filed *amicus curiae* briefs in this Court urging the unconstitutionality or illegality of discriminatory laws or practices, *e.g.*, *Shelley* v. *Kraemer*, 334 U.S. 1 (1948); *Sweatt* v. *Painter*, 339 U.S. 629 (1950); *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Dewey* v. *Reynolds*, 402 U.S. 689 (1971); *Parker Seal* v. *Cummins*, 429 U.S. 65 (1976), *vacated and remanded*, 433 U.S. 903 (1977); *Trans World Airlines* v. *Hardison*, 432 U.S. 63 (1977); and *Sumitomo Shoji America, Inc.* v. *Avigliano*, ___U.S. ___, 102 S. Ct. 1764 (1982). The ADL and the AJC are able to bring to the issues raised on this appeal the perspective of national organizations dedicated to safeguarding all persons' right to equal treatment.

The *amici* seek to submit the accompanying brief because they believe this case presents a serious question regarding a practice which permits a given class of employers, *e.g.*, major institutional law firms, to engage in discriminatory practices while others are barred from engaging in such conduct.*

Respectfully submitted,

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* The Anti-Defamation League and the American Jewish Congress file this brief on their own behalf and on behalf of the following national organizations of American Jews which share their commitment: National Council of Jewish Women, the Union of American Hebrew Congregations and Women's American ORT.

STATEMENT OF THE CASE

Petitioner, Elizabeth Anderson Hishon, a female lawyer, was employed as an associate by the law firm of King & Spalding from 1972 until her discharge in 1979. King & Spalding, a general partnership engaged in the practice of law, with offices in Atlanta, Georgia and Washington, D.C., is comprised of more than one hundred attorneys and more than fifty non-legal personnel. Throughout her tenure at King & Spalding, petitioner had received consistently good evaluations. In 1979, petitioner was denied partnership in the firm and notified that pursuant to the firm's "up or out" policy (i.e., those who are not admitted to partnership may not stay on as associates) her employment would be terminated on December 31, 1979. As of that date, in the one hundred year history of the firm, King & Spalding had never admitted a woman to partnership. Petitioner filed a suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, charging the firm with discrimination on the basis of sex.

The United States District Court for the Northern District of Georgia dismissed the complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. *Hishon* v. *King & Spalding*, 25 Empl. Prac. Dec. (CCH) ¶ 31,703 (N.D. Ga. 1980). The district court held that Title VII does not extend to a person denied admission to partnership by a law firm, since partners are not employees.

On appeal, the Court of Appeals affirmed. *Hishon* v. *King & Spalding*, 678 F.2d 1022 (11th Cir. 1982). The court based its decision on the traditional notion of a partnership as the "voluntary joinder of all parties with each other", upon which the court was not empowered to encroach under Title VII. The court determined that an invitation to partnership does not fall within the coverage of Title VII because it is neither an employment opportunity nor a term and condition of employment.

SUMMARY OF ARGUMENT

There is but one issue raised in this case—the applicability of Title VII to the decision of a large institutional law firm to promote an associate into the partnership. *Amici* submit that Congress intended Title VII to be so applied.

There has been a long and documented history, pre and post enactment of Title VII, of exclusion of different groups from the partnership ranks. A decision by this Court that Title VII does not apply to this process will have the effect of sanctioning this discrimination and allowing it to perpetuate.

Amici contend that partnership decisions are subject to Title VII. The relationship that large institutional law firms have with their associates clearly falls within the language of the statute. Congress explicitly included "partnerships" in Title VII. These firms, including King & Spalding, employ more than the statutorily required fifteen persons. Further, the non-discriminatory consideration for promotion to partner while associates are still employees is a "term, condition or privilege of employment" explicitly covered by Title VII. Applying Title VII to the hiring of associates at these firms but not their promotion to partnership would produce inequitable results. Law firms would be required to hire associates on a non-discriminatory basis but then permitted to discriminate against them in promotion to partnership.

Moreover, King & Spalding cannot assert that it has a right to discriminate in this process because it is a voluntary association. A constitutional right of association can only be asserted in connection with a legitimate First Amendment activity. It cannot be used to protect the partnership decisions of large institutional law firms engaging primarily in ordinary professional and business acivities from the prohibitions of Title VII.

Nor can this type of discrimination be justified under the right of privacy. That right exists only in the context of an intimate or familial relationship but does not exist to permit a business and professional enterprise such as King & Spalding to discriminate in promoting attorneys to partnership.

Finally, even assuming that King & Spalding can invoke the right of voluntary association, that right must be weighed against Congress' power to prohibit discrimination under the Commerce Clause. Courts have already acknowledged that Title VII applies to the relationship between a law firm and its associates. Moreover, applying Title VII to partnership decision furthers a compelling governmental interest in banning discrimination. And, application of Title VII to King & Spalding's promotional practices will still enable them to choose the best candidates for partnership; albeit in a non-discriminatory manner. Thus, King & Spalding's asserted right of association must give way to Congress' commerce power.

ARGUMENT

I.

THE HISTORY OF DISCRIMINATION IN PROMOTING ATTORNEYS FROM ASSOCIATE TO PARTNER AT LARGE INSTITUTIONAL LAW FIRMS MANDATES THE APPLICATION OF TITLE VII TO THOSE DECISIONS

The issues in this case clearly transcend the question of discrimination on the basis of sex. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, prohibits discrimination in employment on the basis of race, color, religion and national origin, in addition to sex. Prior to the enactment of Title VII, there was a clear history of employment discrimination in the large institutional law partnerships. Even with the passage of this Act, that discrimination has continued.

Over time, different groups have suffered from discriminatory hiring and promotional practices in large institutional law firms. While some groups have overcome the barriers which once confronted them, others remain excluded. The history of the legal profession illustrates that the process of deciding who will be promoted from associate to partner at these firms is marred by widespread religious, racial and sex discrimination. Those groups who are being victimized today should have redress under the law. Moreover, history should not be allowed to repeat itself so that those groups which have successfully surmounted those barriers again fall prey to discrimination. *Amici* request that this Court not place its imprimatur on discrimination in the partnership decisional process at large institutional firms.

Prior to World War II, Jewish lawyers were, with some exceptions, excluded from partnership in large institutional firms.[1] In his autobiography, Milton Gould, a senior partner in the New York City law firm of Shea & Gould stated, "[t]he ugly fact is that until the coming of the New Deal and World War II, the doors of the prestigious law firms in New York were virtually

1. J. Auerbach, *Unequal Justice* (1976) at 29.

closed to Jews and other minorities. . ."[2] Even in New York City, where approximately sixty percent of the bar is Jewish, for the better part of the twentieth century few Jewish partners were to be found among the Wall Street firms.[3]

At first, the barriers that existed towards Jewish lawyers prevented them from even securing entry level positions. In 1949, Joseph Proskauer, a senior partner at Proskauer Rose Goetz & Mendelsohn recorded his experience as follows:

> . . . It did not take me many days to discover that the doors of most New York law offices in 1899 were closed with rare exceptions, to a young Jewish lawyer. Fifty years have elapsed since then and I am happy to record that there has been a distinct improvement in the situation; though it still remains true that generally the Jewish student must qualify twice for such employment.[4]

Although the period between 1899 when Joseph Proskauer first attempted to find employment and 1949 when he recorded his observations saw Jewish graduates of the Ivy League law schools being employed at large institutional firms, Jewish lawyers were still for the most part barred from the partnership.

Moreover, there was the problem of self-perception. Studies commissioned in the 1950's and 1960's by both the Anti-Defamation League of B'nai B'rith and the American Jewish Congress reflected the fact that Jewish law students and lawyers believed that these large firms discriminated against Jews and that hence "it would be a waste of time to apply."[5] These same people declined to accept positions with the large institutional firms even if they were offered employment because they feared that they

2. P. Hoffman, *Lions of the Eighties* (1982) at 202.

3. J.E. Carlin, *A Survey of the New York City Bar* (1966) at 19.

4. J.M. Proskauer, *A Segment of My Times* (1950) at 30.

5. Note, *The Jewish Law Student and New York Jobs—Discriminatory Effects in Law Firm Hiring Practices*, 79 Yale L.J. 625, 654 (1964) (hereinafter, Note, *The Jewish Law Student*). *A Survey of the Employment Experiences of Law School Graduates of Chicago, Columbia, Harvard and Yale Universities*, American Jewish Congress, Commission on Law and Social Action (May, 1954) (unpublished manuscript) at 2.

would never be offered a partnership share.[6] Thus, fear of discriminatory treatment may have caused Jewish lawyers to perpetuate the religious imbalance at these large firms.

Nor were the Jews the only victims of religious discrimination. For a time Catholics too felt the sting of disparate treatment. Although the doors of large institutional firms were opened to Catholics long before they were opened to Jews, Donovan Leisure Newton & Irvine was reported to have been founded in 1929 by William Donovan because as a Catholic, he had faced discrimination at the Wall Street firms.[7]

An honest appraisal of the status of Jewish lawyers in the bar today reveals that the picture has changed. A study done by the Yale Law Journal in 1964 at the request of the Anti-Defamation League revealed "that straightforward prejudice [against Jews] has been on the wane for years and [will] continue to decline in importance."[8] Other groups such as blacks, Hispanics and women still face tremendous barriers to success at these large law firms. More than two-thirds of these firms have no black partners and over three-quarters of these same firms have no Hispanic partners.[9]

At issue in the instant case is the propriety of considering the race, sex or ethnicity of an attorney up for promotion into a large institutional partnership. *Amici* submit that the law does not allow these factors to be utilized.

6. Note, *The Jewish Law Student*, *supra* at 655.
7. Hoffman at 204.
8. Note, *The Jewish Law Student*, *supra* at 653.
9. Margolick, *The Blue-Chip Firms Remain Mostly White*, New York Times, Feb. 13, 1983 at 57, Col. 1. The situation with respect to women at these firms has been addressed in petitioner's brief, as well as in the briefs of other *amici*.

II

THE PARTNERSHIP DECISIONS OF INSTITUTIONAL LAW FIRMS ARE PROPERLY SUBJECT TO TITLE VII JURISDICTION

Title VII must be held to apply to the decision to offer a partnership to an associate in a law firm otherwise subject to Title VII jurisdiction, in order to effectuate the sound purposes underlying its enactment. In failing to so hold, the lower courts erred by:

(1) Unnecessarily limiting the scope of Title VII statutory jurisdiction;

(2) Giving credence to a "right of voluntary association" of constitutional dimension which should not exist for a partnership organized for a commercial purpose; and

(3) Failing to balance any such right of voluntary association with Congress' regulatory power under the Commerce Clause.

A. Hishon's Complaint States a Valid Claim Under Title VII

There can be little doubt that the claim stated by Hishon is covered by Title VII. First, the relationship that large institutional law firms have with their associates clearly falls within the ambit of Title VII. *Kohn* v. *Royall, Koegel & Wells*, 496 F.2d 1094 (2d Cir. 1974); *Lucido* v. *Cravath, Swaine & Moore*, 425 F. Supp. 123 (S.D.N.Y. 1977); *Blank* v. *Sullivan & Cromwell*, 418 F. Supp. 1 (S.D.N.Y. 1975). Congress explicitly included "partnerships" in Title VII. 42 U.S.C. § 2000e(a).[10] These firms, including King & Spalding, employ more than the statutorily required fifteen persons. Further, the non-discriminatory consideration for promotion to partner while associates are still employees is a "term, condition or privilege of employment" explicitly

10. The Equal Employment Opportunity Commission also took the position that a law partnership was explicitly covered by Title VII in its *amicus* brief before the Eleventh Circuit.

covered by Title VII.[11] Further, the decisions below rest in part on a belief that Title VII should not apply to promotion practices which are based on subjective as well as objective criteria. The district court explicitly noted that "in professional partnerships, new mates or partners are sought and bethrothed for different reasons and to serve different needs of the partnership." 25 Empl. Prac. Dec (CCH) ¶ 31,703 at 20.062. However, when Congress amended Title VII in 1972 to include promotion and tenure decisions made by educational institutions, it clearly indicated that upper-echelon jobs, which take into account subjective as well as objective factors, are covered under Title VII. During the debate on a proposed amendment to Title VII which would have excluded physicians employed by private or public hospitals from coverage under the statute, Senator Javits said:

> . . . this amendment would go back beyond decades of struggle and of injustice and reinstate the possibility of discrimination on grounds of ethnic origin, color, sex, religion—just confined to physicians or surgeons, one of the highest rungs of the ladder that any member of a minority could attain—and thus lock in and fortify the idea that being a doctor or surgeon is just too good for members of a minority and that they have to be subject to discrimination in respect of it, and the Federal law will not protect them. 118 Cong. Rec. 1463-64. (1972).

So, too, the courts should not abdicate their role in remedying discrimination merely because subjective criteria can be more difficult to review. One court has stressed that simply because a decision to hire or promote may be subjective,

> does not mean that such judgment cannot or should not be subjected to close scrutiny in order to determine whether such judgment is being exercised in good faith or merely as a pretextual cloak for disguising racial discrimination. In fact, *it is precisely because such an evaluation, highly*

11. In this regard, the Eleventh Circuit's majority opinion conflicts with another federal court's holding on this issue. *Lucido* v. *Cravath, Swaine & Moore*, 425 F. Supp. 123, 128 (S.D.N.Y. 1977). *See also* Note, *Applicability of Federal Anti-Discrimination Legislation to the Selection of a Law Partner*, 76 Mich. L. Rev. 282, 286-292 (1976).

> *subjective as it is, may mask racial bias, that it must be rigorously reviewed. Milton* v. *Bell Laboratories, Inc.*, 428 F. Supp. 502, 507 (D.N.J. 1977) (emphasis added; citations omitted).

See also Kunda v. *Muhlenberg*, 621 F.2d 532, 548 (3rd Cir. 1982) (college tenure and promotion procedure may not be used as a mechanism to obscure discrimination); E. Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 945 (1982).

The evaluation of an individual for promotion to partner or discharge for failure to be promoted to partner may involve considerations which cannot be quantified. The application of Title VII to law partnership decisions would not require that the most objectively qualified associate be made partner—promotion to partnership is a business decision which includes analysis of factors other than an associate's ability to conduct legal research. What such application of Title VII *would* require is that the law firm, in deciding which associates to promote to partnership, not utilize race, sex or ethnicity as factors. *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981); *Lieberman* v. *Gant*, 630 F.2d 60 (2d Cir. 1980). The Eleventh Circuit has departed from this fundamental principle by immunizing promotional decisions from the application of Title VII.

Clearly, discriminatory partnership decisions can have an impact upon the hiring decisions of a law firm at the associate level. This the courts have already recognized as falling within the ambit of Title VII. *Kohn* v. *Royall, Koegel & Wells*, 496 F.2d 1094; *Blank* v. *Sullivan & Cromwell*, 418 F. Supp. 1. It would be ironic indeed if a law firm could avoid its clear statutory responsibility to hire associates without regard to their race, religion, national origin, or sex by indirectly discouraging applicants through an allegedly lawful refusal to offer them partnerships after they have worked for the firm for the required number of years. The effect of such a holding is clear. The partners of a large law firm could presumably make the following statement to the law student population:

> This law firm offers employment to qualified law school graduates without regard to race, color, religion, sex, or national origin. We will provide equal work assignments, wages, and other conditions of employment to all associates without regard to ethnic criteria. However, the partnership will not accept into its ranks any woman, black or Hispanic associate.

Hishon alleges that this was effectively King & Spalding's policy. This says to minority and female law students throughout the nation that the partnership doors in major law firms may be closed to them and that such action cannot be addressed under Title VII.

The district court below noted that the lack of similar law suits indicates that no problem exists which warrants judicial intervention. To the contrary, the lack of judicial activity merely demonstrates the fear and futility felt by minority and female lawyers seeking to break into a closed fraternity. Hishon was fortunate enough to obtain a partnership in another firm and thus can afford the risk of suing her former employer. More typically, an unsuccessful partnership candidate is dependent in large measure on his or her former employer for references.

Opportunity should be available to talented individuals to be promoted to all levels within these large firms without regard to race, sex, religion or national origin. The application of Title VII to these promotional decisions insures that this occurs in a non-discriminatory manner.

B. A Commercial Enterprise Has no Constitutionally Protected Right of Association

Although the lower courts did not base their rulings directly on a "right of freedom of association", the rulings of both courts appeared to be influenced by the theory that "partnership" is a *"voluntary association* of two or more persons" whose "very essence is the *voluntary joinder* of all partners with each other." 678 F.2d at 1028 (emphasis added). The district court strongly implied that it would have held Title VII unconstitutional if it found that Title VII applied to the selection of partners by a law

firm. 25 Empl. Prac. Dec. (CCH) at 20,062. The majority of the court of appeals resisted the application of Title VII to King & Spalding because it would be "encroaching upon individuals' decisions to *voluntarily* associate in a business partnership." 678 F.2d at 1028 (emphasis added).

This Court first recognized the right of voluntary association in *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1957) in which the state of Alabama sought records and membership lists from the NAACP ostensibly to enforce its foreign corporations' regulations. The Court held that the enforcement of the law impermissibly interfered with members' associational rights because it tended to discourage participation in the NAACP. However, the right of voluntary association was found to exist only because the primary purpose of the association was to engage in protected First Amendment activities:

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. . . .It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an unseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment which embraces freedom of speech. . . . (citations omitted) *Id.* at 460.

From the time of *NAACP* v. *Alabama* to the present, this Court has not recognized an unlimited constitutional right of voluntary association which protects otherwise unlawful activity merely because it is done in concert. Rather, this Court has established a more restricted right to join with others to pursue goals independently protected by the First Amendment. Thus, a right of association exists where individuals join together for political advocacy, *Cousins* v. *Wigoda*, 419 U.S. 477 (1975); religious worship, *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976); and to secure access to the judicial system for redress of grievances on behalf of people who would not otherwise be able to do so, *NAACP* v. *Button*, 371 U.S. 415 (1963).

An individual who is an employer, covered by Title VII, is not free to discriminate on the basis of race, sex, religion or national origin. That individual is not acting with others to pursue protected First Amendment rights. While an individual may be free to discriminate in his private life, that freedom is lost when he joins with others in an employment relationship. Congress, by enacting Title VII, saw fit to proscribe such conduct. As this Court noted in *Norwood* v. *Harrison*, 413 U.S. 455, 470 (1973), not only is there no affirmative constitutional right to discrimina.., but Congress may make discrimination unlawful. King & Spalding cannot enlarge its right of voluntary association to permit it to engage in otherwise prohibited conduct merely because a group of individuals have formed together in a professional partnership to pursue business goals.[12] A professional partnership or association engaged primarily in a business enterprise does not lose its character as a business merely because professionals are involved. *See* 118 Cong. Rec. 1463-64 (1972) (statement of Senator Javits).

Just as Congress has the power to ban discrimination, it can also carve out exceptions to this prohibition. The coverage of Title VII in fact was not extended to employers who employ less than fifteen employees. 42 U.S.C. § 2000e(b). In addition, Congress created an exemption for religious corporations, associations and educational institutions when exercising preferential employee selection in carrying out the activities of these organizations. 42 U.S.C. § 2000e(2)(e). Similarly, the ban upon discrimination in places of public accomodation contained in Title II of the Civil Rights Act of 1964 does not apply to clubs that are truly private in nature. 42 U.S.C. § 2000a(e). And, Title VIII, the Open Housing Act of 1968, contains an exemption for single family dwellings, 42 U.S.C. § 3603(b)(1); the boarding house in which the owner lives so long as it contains no more

12. *See Runyon* v. *McCrary*, 427 U.S. 160, 176 (1976), where this Court noted that even if "parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable. . . it does not follow that the practice of excluding racial minorities from such institutions is also protected by the same principle."

than three other units for families living independently, 42 U.S.C. § 3603(b)(2); purely private clubs which give preference to their members in housing not operated on a commercial basis, 42 U.S.C. § 3607; and religious organizations that own or operate housing for other than commercial purposes, 42 U.S.C. § 3607. These specific congressional exemptions do not, however, give rise to an unfettered right of voluntary association for other than the assertion of protected First Amendments rights.

Moreover, even in certain circumstances where Congress has carved out an exemption to the Open Housing Act and the Public Accomodations Law for private clubs that might assert a right of association akin to that being argued by King & Spalding herein, it did not wholly extend that exemption to commercial activities. Explicit in the Open Housing Act is the requirement that private clubs may not discriminate in providing housing to its members if the housing is operated for commercial purposes. Under Title II, indicia that a club is not private are the predominance of profit motive, *Cornelius* v. *Benevolent Protective Order of Elks*, 382 F. Supp. 1182, 1203 (D. Ct. 1974) and whether it is a commercial enterprise operated for the benefit of a small group. *Wright* v. *Cork Club*, 315 F. Supp. 1143 (S.D. Tex. 1970).

Accordingly, little if any protection attaches to a right of association for commercial purposes.[13] In *Garcia* v. *Texas State Board of Medical Examiners*, 421 U.S. 955 (1975), *aff'g mem.*, 384 F. Supp. 434 (W.D. Tex. 1974), no such right of association was found by the court to exist for a group medical practice set up to provide low-cost medical care to low-income groups. There, a group of non-physicians who had banded together to deliver these services sought to challenge a Texas statute prohibiting laymen from forming corporations to practice medicine. The district court rejected the freedom of association argument finding that "plaintiffs do not seek to engage in activity protected under the First Amendment or any other Constitutional provision . . .", but

13. This Court has been consistently less solicitous of commercial activities even when connected to the clear First Amendment right of free speech. *See, e.g., Central Hudson Gas & Electric Corp.* v. *Public Service Commission of New York*, 447 U.S. 557 (1980).

are merely associating together for the purpose of practicing medicine without a license. 384 F.Supp. at 439. In *NAACP* v. *Button*, 371 U.S. 415 (1963), however, this Court upheld the right of association for a group of legal practice, where litigation was being used as a form of political advocacy. The NAACP was utilizing the judicial process to break down racial barriers and to secure rights for the minority group it was representing.

The right of association was also recognized in *In Re Primus*, 436 U.S. 412 (1978). The American Civil Liberties Union extended an offer of free legal assistance to a gathering of women who had been sterilized as a condition of receiving public medical assistance. The offer of legal assistance came in conjunction with addressing these women to advise them of their legal rights stemming from the sterilization. This was held to be within the zone of First Amendment protection reserved for "associational freedoms" in that "[t]he ACLU engages in litigation as a vehicle for effective political expression and association, as well as a means of communicating information to the public." *Id.* at 432. In contrast, that same day, this Court upheld disciplinary action taken against an attorney for an in-person solicitation of a client in a hospital room. *Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447 (1978). This, the Court reasoned, involved nothing more than commercial activity and was not entitled to constitutional protection. Thus, where the solicitation directly related to the expression of ideas it was upheld, but where it implicated no more than a profit motive it was denied.

Institutional law firms like King & Spalding are clearly not primarily engaged in political, ideological, social or religious advocacy when making hiring or promotion decisions, but rather in ordinary professional business activities. Beyond the actual practice of law, these firms must consider how to attract clients, what fees to charge, what salaries to pay and how partnership shares should be allocated. Hiring, recruiting and promotion practices are clearly business activities related to considerations of profitability and productivity and are therefore within the scope of Title VII.

The use of the partnership form of organization appears to be unconnected with the nature of the lawyer's practice or his/her relationship with clients. Historically, the partnership form was "basically the only organization in which [lawyers] could practice, since incorporation ws forbidden by licensing laws or professional tradition." J. Crane and A. Bromberg, *Law of Partnerships* at 182 (1968); *see* Note, *Tenure and Partnerships as Title VII Remedies*, 94 Harv. L. Rev. 457, 463 (1980). Today, lawyers practice law as solo practitioners, in the partnership form or in professional corporations. Some partnerships have both equity and non-equity partners. The association of lawyers in partnerships to practice law is premised essentially upon business considerations. The choice of the partnership structure was never meant to sanction discriminatory conduct, if such conduct was otherwise made illegal for business enterprises.

The courts below sought to justify this type of discrimination by partnerships by resting it upon the right of privacy. Analogizing a law partnership to a marriage, the district court cited *Griswold* v. *Connecticut*, 381 U.S. 479 (1965) for the proposition that the "privacy interests" of the more than sixty "spouses" to the King & Spalding "marriage" outweigh Congress' power to outlaw sex discrimination. Yet the *Griswold*-privacy line of cases is factually inapposite here. In *Griswold*, the Court recognized a right of privacy to use contraceptives in the home. Cases following *Griswold* likewise involve the right of privacy to protect intimate personal or family relationships. *See, e.g., Roe* v. *Wade*, 410 U.S. 113 (1973) (right of privacy restricts governmental interference with abortion decisions); *Bellotti* v. *Baird*, 443 U.S. 622 (1979) (right of privacy protects minors' abortion decisions). This right has never been extended beyond the context of that type of intimate or familial relationship. Whatever may be the extent of the right of privacy in the home, it cannot be invoked to permit a major business and professional enterprise such as King & Spalding to engage in discrimination when such discrimination is forbidden to other businesses.

C. Congress' Power Under the Commerce Clause to Prohibit Discrimination Overrides Any Right of Voluntary Association Which May Exist

In recognizing King & Spalding's right to discriminate, both the district court and the court of appeals paid little attention to the source of congressional power in enacting anti-discrimination legislation. Article I § 8 of the United States Constitution empowers Congress "to regulate Commerce. . . among the several States." King & Spalding[14] and most other large law firms engage in their legal activities without regard to state borders. They have placed themselves into interstate commerce and therefore are subject to regulation under the Commerce Clause.

Congress' power to legislate under the Commerce Clause includes the power to regulate the American labor market. As Justice Stevens stated in his concurrence in *EEOC* v. *Wyoming*, ___ U.S. ___, 51 U.S.L.W. 4219 (Mar. 2, 1983), "[t]oday, there should be universal agreement on the proposition that Congress has ample power to regulate the terms and conditions of employment throughout the economy." *Id.* at 4225. *See also United States* v. *Darby*, 312 U.S. 100 (1941); *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). Employment legislation is a natural outgrowth of the Commerce Clause. This Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), stated that "the objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Id.* at 430.

King & Spalding asserts that the right of voluntary association precludes the application of Title VII to its promotional decisions. Even assuming *arguendo* that a right of voluntary association exists at large institutional law firms, that right must be weighed against the commerce power.

This is not the first time that this Court has been called upon to weigh Congress' right to ban discrimination under the Commerce

14. King & Spalding has in fact opened offices across the country and employs lawyers licensed to practice in more than one jurisdiction.

Clause against another asserted constitutional right. Thus, in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), the Court upheld Title II of the Civil Rights Act of 1964, the Public Accommodations Law, 42 U.S.C. §2000a, against charges that application of that Act to the motel in question amounted to a deprivation of liberty or property under the Fifth Amendment. More recently, in *EEOC* v. *Wyoming*, 51 U.S.L.W. 4219, this Court affirmed Congress' power under the Commerce Clause to apply the Age Discrimination in Employment Act of 1967 (ADEA) to state government employees. The state of Wyoming had asserted that this was a purely local matter reserved to the states under the Tenth Amendment.[15] The Court reached its conclusion by finding that (1) Congress had explicitly included state and federal workers within the coverage of the ADEA; (2) Congress had a compelling interest in prohibiting age discrimination; and (3) the applicability of the ADEA did not directly impair the states' ability to "structure their integral operations in areas of traditional governmental functions." *Id.* at 4222.

Although King & Spalding relies on the First Amendment, rather than the Tenth Amendment, the Court's analysis in *EEOC* v. *Wyoming* is instructive. First, as demonstrated above, the relationship that large institutional law firms have with their associates clearly falls within the ambit of Title VII, *see* pp. 8, 10, *supra*. Second, prohibiting discrimination is clearly a compelling governmental interest. Third, the application of Title VII to promotional decisions will not impair King & Spalding's ability to structure its internal operations. They will still be able to promote those candidates that are best suited for partnership at the firm. They will simply not be permitted to do so in a discriminatory manner.

15. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Constitution, Amendment X.

CONCLUSION

For the foregoing reasons, the judgment of the Courts below should be reversed and Title VII should be held applicable to the promotional process at large institutional law firms.

Respectfully submitted,

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No. 82-940

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Petitioner,

VS.

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BRIEF *AMICI CURIAE* FOR CALIFORNIA WOMEN LAWYERS, THE BAR ASSOCIATION OF SAN FRANCISCO AND THE BARRISTERS CLUB OF SAN FRANCISCO IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

California Women Lawyers ("CWL") is a non-discriminatory state-wide bar association which advocates equal legal rights for women. Its affiliates include eleven of the largest local women's bar associations in California. CWL represents the interests of approximately 10,000 women lawyers in the state.

The Bar Association of San Francisco ("BASF") is a voluntary association of approximately 6,100 attorneys engaged in public and private law practice in the City and County of San Francisco, including many who practice as members of the largest law firms in our region. The Barristers Club of San Francisco is comprised of those members of BASF who have been in practice under five years or who are under 36 years of age; as such, it has a special interest in fair opportunities for career advancement. These associations have long recognized that women and minority attorneys should be afforded equal opportunity to advance in their professional careers, and have sought through various programs and committees to remedy the past imbalance in the profession.

Although significant strides have been made, and the percentage of women and minority attorneys has markedly increased in recent years, Amici are committed to the continuation of this trend toward the acceptance of women and minority attorneys in every phase of the legal profession, a goal which was plainly set by the enactment of Title VII in 1964. Amici acknowledge the worthy purpose of Title VII, and the vast remedial effect its broad application has had on employment practices throughout the nation. Amici are satisfied that no legitimate interests of the legal profession will be impaired by application of Title VII to the partnership decision here at issue. To the contrary, while many law firms pride themselves on maintaining uniformly high professional standards and collegiality among the partners, those laudable goals can be achieved without consideration of race, religion, national origin or sex. Indeed, a decision which may create an exodus of talented women attorneys from the ranks of private law firms would not only undermine the collegiality which male and female lawyers practicing in the same firm have developed and enjoy, but would adversely affect the overall well-being of firms which endeavor to maintain a practice of the highest possible caliber. Amici therefore affirm their support of the standards set forth in Title VII.

Moreover, as lawyers, Amici are mindful of the impact of the decision of the court below on public confidence in the legal profession. In striving for the respect of society in their role as champions of equal justice under law, members of the profession must not—and Amici do not—claim for themselves the right to discriminate on the basis of race, religion, national origin, or sex in selecting their partners. Amici therefore join together to urge reversal of a decision which both imperils the compelling goal of eradicating discrimination in all professional employment and threatens to erode public confidence in the legal profession.

SUMMARY OF ARGUMENT

I.

Advancement to partnership by an associate in a law firm is precisely the type of promotional opportunity which Title VII was designed to cover. Congress intended Title VII to reach all rungs of professional life, and partnership represents one of the higher steps in the legal profession. To the thousands of lawyers who work in law firms organized as partnerships, partnership represents not only the recognition of achievement in the practice of law, but the opportunity for increased responsibility, more diverse activity, and continued accomplishment. This avenue of career development must not deviate from the standards of fair employment set by Title VII.

II.

In two respects, the determination of whether an associate will become a partner at King & Spalding represents a "term, condition, or privilege" and an "opportunity" of employment subject to scrutiny by Title VII. First, King & Spalding has a policy to consider each of its associates for partner after a reasonable period of time. "Terms, conditions, or privileges" and "opportunities" of employment within the scope of Title VII are construed broadly, and include practices in the workplace which stigmatize a certain group of employees, as well as practices with economic impact. Because opportunity for partnership is held out as an incentive for associates, and because it

affects an associate's working environment, the partnership determination is an integral part of an associate's job conditions.

A second, and distinct, reason for the application of Title VII in this case is the existence of an "up or out" policy at King & Spalding. The discharge of Petitioner was inextricably tied to the determination to reject her from partnership. Partnership was therefore a "term" or "condition" of continued employment and the determination to reject Petitioner is subject to the standards set by Title VII.

III.

The application of Title VII in this case cannot be defeated by any associational interests of King & Spalding. Associational rights are not absolute, and the compelling governmental objective embodied in Title VII far outweighs any associational rights which may exist in the commercial context of the King & Spalding partnership. In all events, the First Amendment does not protect any asserted interest in practicing discrimination. The partnership therefore may not avoid the mandate of Title VII.

ARGUMENT

I.

THE HIGHER ECHELONS OF THE LEGAL PROFESSION ARE NOT EXEMPT FROM TITLE VII.

Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e *et seq.*) was intended to assure that advancement in employment, including professional employment, would not be denied on the basis of race, color, sex, religion or national origin. *Alexander v. Gardner-Denver Company*, 415 U.S. 36, 44 (1974) ("Title VII . . . to assure equality of employment opportunities by eliminating those practices and devices that discriminate on [prohibited bases]"); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973) ("Title VII . . . to eliminate those discriminatory practices and devices which have fostered racially stratified job environments").

In the debate concerning a proposed exclusion from Title VII for physicians and surgeons, Senator Javits stated:

> "One of the things that those discriminated against have resented the most is that they are

> relegated to the position of the sawers of wood and the drawers of water; that only the blue-collar jobs and ditchdigging jobs are reserved for them; and that though they built America, and certainly helped build it enormously in the days of its basic construction, they cannot ascend the higher rungs in professional and other life.
>
> • • •
>
> "Yet, this amendment would go back beyond decades of struggle and of injustice, and reinstate the possibility of discrimination on grounds of ethnic origin, color, sex, religion—just confined to physicians or surgeons, one of the highest rungs of the ladder that any member of a minority could attain—and thus lock in and fortify the idea that being a doctor or a surgeon is just too good for members of a minority, and that they have to be subject to discrimination in respect of it, and the Federal law will not protect them." (118 Cong. Rec. 3802 (1972))

See also EEOC v. *Rinella & Rinella*, 401 F. Supp. 175, 180 (N.D. Ill. 1975); Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947, 980-82 (1982).

Congress—which defeated the proposed exemption for physicians (*see EEOC* v. *Rinella & Rinella, supra*, 401 F. Supp. at 179-80), and abolished an express exemption for academic appointments in 1972 (Equal Employment Opportunity Act, Pub. L. No. 92-261, § 2(1), 86 Stat. 103, 42 U.S.C. § 2000e(a) (1972) (amending 42 U.S.C. § 2000e(a) (1970)))—intended to eradicate barriers preventing women and minorities from reaching *all* rungs of professional life, and contemplated no exemption for lawyers. *See McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, 283 (1976) (Title VII "prohibits *all* racial discrimination in employment, without exception for any group of particular employees"). Just as courts have applied Title VII to a university's determination of whether to award tenure to a professor (*Kunda* v. *Muhlenberg College*, 621 F.2d 532 (3d Cir. 1980); *Abramson* v. *University of*

Hawaii, 594 F.2d 202, 207-10 (9th Cir. 1979); *cf. Delaware State College v. Ricks*, 449 U.S. 250 (1980) (denial of tenure before amendment of Title VII to omit exemption for educational institutions not subject to review)), so must it apply to a decision whether to promote an associate lawyer to partner. *See* Note, *Tenure and Partnership As Title VII Remedies*, 94 HARV. L. REV. 457, 459 (1980) ("Tenure and partnership are badges of success in the academic and legal worlds").

The application of Title VII to the practice of law has been consistently affirmed. It applies to secretaries in law firms (*EEOC v. Rinella & Rinella, supra*), to summer law clerks (*Kohn v. Royall, Koegel & Wells*, 59 F.R.D. 515 (S.D.N.Y. 1973), *appeal dismissed*, 496 F.2d 1094 (2d Cir. 1974)), to the hiring of attorneys (*Frausto v. Legal Aid Society*, 563 F.2d 1324 (9th Cir. 1977) (attorney for legal aid society); *Milton v. Bell Laboratories, Inc.*, 428 F. Supp. 502 (D.N.J. 1977) (in-house attorney for corporation); *Blank v. Sullivan & Cromwell*, 418 F. Supp. 1 (S.D.N.Y. 1975) (law firm attorney)), and to the promotion of attorneys (*Neale v. Dillon*, 534 F. Supp. 1381 (E.D.N.Y. 1982) (failure to promote assistant district attorney to deputy bureau chief); *Lucido v. Cravath, Swaine & Moore*, 425 F. Supp. 123 (S.D.N.Y. 1977) (failure to promote associate to partner)). Before the decisions by the lower courts in this case, the only decision addressing the question of whether promotion of an associate to a law firm partnership was covered by Title VII was *Lucido v. Cravath, Swaine & Moore, supra*. In a logical and persuasive opinion, the court held Title VII applicable. *See* Section II(A), *infra*. In its opinion below, the Eleventh Circuit disagreed. *Hishon v. King & Spalding*, 678 F.2d 1022 (11th Cir. 1982), *cert. granted*, ____ U.S. ____, 51 U.S.L.W. 3552 (Jan. 25, 1983). The effect of that decision is to withdraw the beacon of the fair employment laws from an important career step for thousands of lawyers.[1]

[1] Lawyers in large firms represent a very substantial number of the total number in practice. As of 1980, 70% of the 535,000 lawyers in this country were engaged in private practice. Middleton, *You're Not Alone: Half Million Lawyers in U.S.*, 67 A.B.A. J. 1098 (1981). Of those, 47% practiced solo and 53% practiced in firms. *Id.* Firms with more than 20 lawyers accounted for 13% of all practicing lawyers. *Id.* at 1099.

Advancement from an associate position to partnership in a law firm (or election to the board of directors in a professional law corporation[2]) is a step which at once reflects and permits professional growth and development. The progression from associate to partner brings with it the opportunity for increased supervision of other lawyers, increased client contact and responsibility, and more diverse professional activities. Countryman, Finman & Schneyer, THE LAWYER IN MODERN SOCIETY 35 (2d ed. 1976). Indeed, an associate's professional development in a law firm has very real limitations until he or she is admitted to partnership:

> "[A]ssociate lawyers are employees and are supervised. This means they do not meet one of the criteria of the professional model. Supervision limits their personal responsibility and individual authority. It limits them in terms of the kind of assignments they receive, the client with whom they have to work, the extent to which they can work a matter through on their own." (*Id.* at 34)

Another commentator concludes that "an associate should aspire to become a partner. He should view his associate status as an apprenticeship, with full admission to the craft occurring only when he's joined the partnership ranks." Freund, LAWYERING, A REALISTIC APPROACH TO LEGAL PRACTICE 5 (1979).

This general recognition that election to partnership represents career advancement, in the sense of increased opportunity for achievement and recognition in the practice of law, is also

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[2] The court below did not address the question of the application of Title VII to a professional law corporation and, indeed, was apparently compelled to its decision because of its perception that in this case "the [partnership] form *is* the substance . . . ." *Hishon v. King & Spalding*, *supra*, 678 F.2d at 1028. Amici therefore do not address the issue of whether election of an associate to the board of directors of a professional corporation would be covered by Title VII, except to note that plainly the application of Title VII should not depend on whether the law firm is a partnership or a professional corporation—a determination based, up to now, on tax and personal liability considerations. *See, e.g.*, Diamond, *Why a Law Firm or Its Partners Should Incorporate*, PRAC. LAW., July 15, 1982 at 55, 56. ("Professional corporations . . . [are] nothing more than a different legal format for conducting a professional practice"); Middleton, *Larger Law Firms Ponder Corporate Step*, 67 A.B.A. J. 693 (1981).

reflected in the King & Spalding partnership agreement. That document specifies that "[e]ach partner . . . shall devote his full time and attention to the business of the firm"—"the general practice of law"—unless a special arrangement is reached. King & Spalding Partnership Agreement, ¶3 (R.161, J.A.153).[3] The major role of the King & Spalding partners is therefore the practice of law. Naturally, continued practice and added responsibility contribute to the professional development of all lawyers, including partners, at King & Spalding. Thus, the main feature of partnership at King & Spalding, as in most law firms, is the opportunity for a lawyer to reach the peak of his or her profession through increased responsibility and continuing development as a counselor and an advocate.

The rejection of otherwise-qualified attorneys from such career advancement on the basis of race, color, sex, religion, or national origin, we submit, was never intended to be and is not now tolerated by Title VII of the Civil Rights Act of 1964.

II.

ADMISSION TO PARTNERSHIP IS ONE OF THE "TERMS, CONDITIONS, OR PRIVILEGES" AND "OPPORTUNITIES" OF EMPLOYMENT AT KING & SPALDING.

A. The King & Spalding Policy Of Employing Associates With The Expectation That They Will Be Considered For Partnership Within A Reasonable Period Of Time Is A "Term, Condition, Or Privilege" And "Opportunity" Of Employment.

As alleged in the complaint, and by Respondent's own admission, all associates at King & Spalding "are employed with the expectation that they will be considered for invitation to partnership on a fair and equal basis within a reasonable

[3] The management of the partnership, with authority "to make any and all decisions, commitments and contracts with respect to the operation and management of the firm," is delegated to a management committee. King & Spalding Partnership Agreement, ¶14 (R. 170-71, J.A. 162-63).

period of time if they meet the firm's standards for partnership." Answer to Complaint, ¶ 8(b) (R.26; J.A.30-31); Complaint, ¶ 8(b) (R.6; J.A.9-10).

Title VII by its express terms requires that the decision whether to extend to an employee a privilege or an opportunity of employment available at the employer company must be made without discrimination on account of race, color, religion, sex or national origin:

> "(a) It shall be an unlawful employment practice for an employer—
>
> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, *terms, conditions, or privileges of employment*, because of such individual's race, color, religion, sex, or national origin; or
>
> "(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of *employment opportunities* or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." (42 U.S.C. § 2000e-2(a)(1) and (2) (emphasis added))

In this case the question presented is whether the opportunity for advancement to partnership is within the "terms, conditions, or privileges" or "opportunities" of employment. In this inquiry it is plain that associates at King & Spalding are employees as defined by Title VII. 42 U.S.C. § 2000e(f); *see Blank v. Sullivan & Cromwell*, 418 F. Supp. 1 (S.D.N.Y 1975). Thus, if consideration for partnership qualifies as a "term, condition, or privilege" or "opportunity" of employment, then the decision whether to offer partnership is covered by Title VII without regard to whether the associate remains an employee upon becoming a partner. As the court reasoned in *NLRB v. Bell Aircraft Corp.*, 206 F.2d 235 (2d Cir. 1953):

> "At the time the discrimination took place [the complainant] was clearly a protected employee, and

> his prospects for promotion were among the conditions of his employment. The [National Labor Relations] Act protected him so long as he held a nonsupervisory position, and it is immaterial that the protection thereby afforded was calculated to enable him to obtain a position in which he would no longer be protected." (*Id.* at 237)

See also Golden State Bottling Co. v. NLRB, 414 U.S. 168, 188 (1973) (damages for unfair labor practice calculated on basis of wages petitioner would have earned but for discharge, even though part of such wages was based on promotion to position in which petitioner would not be covered under National Labor Relations Act).

Properly interpreted and applied, Title VII must cover the decision whether to admit associates to partnership at a firm which, as a matter of policy and practice, considers associates for partnership after a reasonable period. Indeed, Professor James White, in an early study of women in the law, concluded there could be no other analysis of the issue:

> "[T]o say that the prospect of becoming a partner is not one of the attributes or 'privileges' of employment with a law firm is to ignore reality. . . . Undoubtedly the prospect of . . . partnership and the added compensation which it is expected to bring can offset other detriments of a job, such as comparatively low beginning pay or undesirable working conditions. Thus, I classify the opportunity to compete for a partnership position as one of the 'privileges' of employment of which the act speaks." (White, *Women in the Law*, 65 MICH. L. REV. 1051, 1106 (1967))

Economic benefits made available to employees by their employers are "terms, conditions, or privileges" or "opportunities" of employment which fall within the purview of Title VII. The most obvious example is the opportunity for promotion, with its normally attendant increase in compensation. *See, e.g., International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 329, 337-38 (1977); *Watkins v. Scott Paper Co.*,

530 F.2d 1159, 1177 (5th Cir.), *cert. denied*, 429 U.S. 861 (1976); *United States v. Local 189, United Papermakers*, 301 F. Supp. 906, 918 (E.D. La.), *aff'd*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). Likewise, fringe benefits of employment cannot be denied or reduced on the basis of race or sex, even when those benefits are not calculated or payable until after the termination of a person's "employee" status. *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978) (pension plan); *Chastang v. Flynn & Emrich Co.*, 541 F.2d 1040 (4th Cir. 1976) (retirement plan); *Rosen v. Public Service Electric & Gas Co.*, 477 F.2d 90 (3d Cir. 1973) (pension plan); *Taylor v. Goodyear Tire & Rubber Co.*, 6 Fair Empl. Prac. Cas. (BNA) 50 (N.D. Ala. July 31, 1972) (sickness and accident benefits); *Mixson v. Southern Bell Telephone & Telegraph Co.*, 334 F. Supp. 525 (N.D. Ga. 1971) (death benefits).

In applying Sections 2000e-2(a)(1) and (2), courts have been concerned not only with benefits or practices with an economic impact on employees, but also with those having a psychological impact, giving an expansive interpretation to "terms, conditions, or privileges of employment" and "employment opportunities" consonant with the remedial purposes of the statute. In his opinion for the court in *Rogers v. EEOC*, 454 F.2d 234 (5th Cir.), *cert. denied*, 406 U.S. 957 (1971), Judge Godbold noted that:

> "Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of such nefarious activities. Rather it pursued the path of wisdom by being unconstrictive, knowing that constant change is the order of our day and that the seemingly reasonable practices of the present can easily become the injustices of the morrow." (*Id.* at 238)

The court went on to hold that "the phrase 'terms, conditions, or privileges of employment' in Section 703 [42 U.S.C § 2000e-2(a)(1)] is an expansive concept" (*id.*), including within its scope the creation of a working environment heavily charged with discrimination. *See also Henson v. City of Dundee*, 682

F.2d 897, 901 (11th Cir. 1982); *Barnes v. Costle*, 561 F.2d 983, 994 (D.C. Cir. 1977); *Firefighters Institute for Racial Equality v. City of St. Louis*, 549 F.2d 506 (8th Cir.), *cert. denied*, 434 U.S. 819 (1977).

Certainly discrimination in the partnership decision will deprive women and minority attorneys of economic benefits by narrowing the prospect of increased compensation. Perhaps more disturbing is the likelihood that such discrimination will infect their working environment and job opportunities while they are associates. If a law firm perceives that it is free to discriminate in the partnership decision, then it may treat women and minority associates differently, giving work assignments which do not provide the opportunity for these associates to demonstrate their ability to practice law at a level of competence which commends them for partnership, or giving them the least desirable projects.[4] If women and minority associates are subjected to such practices, they will quickly become an underclass within the law firm. *Cf. Frontiero v. Richardson*, 411 U.S. 677, 686-87 (1973) ("statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members"). Moreover, because of the possibility that race or sex may enter into the partnership decision, women or minority associates may feel compelled to embrace a field of legal practice which conforms to stereotypical notions of the field in which they "should" practice, rather than that in which their talents and interests may lie. *See* White, *supra*, 65 *Mich. L. Rev.* at 1062 (data reflecting higher proportion of female attorneys engaged in trusts and estates, domestic relations and tax "accord with the commonly held beliefs about women's practice"); *cf. Mississippi University for Women v. Hogan*, ___ U.S. ___, 50 U.S.L.W. 5068, 5071 (July 1, 1982) (sex-based discrimination in nursing school admissions "tends to perpetuate the stereotyped view of nursing as an exclusively woman's job"). Thus, in a very real sense, if discrimination in the

[4] Indeed, Petitioner has alleged that Respondent "failed and refused to give [Petitioner] work assignments that would contribute to her career advancement." Complaint, ¶17(e) (R.10, J.A.12).

partnership decision is tolerated, the professional development of women and minority associates can be permanently stunted.

The fact that the employment opportunity at issue in this case—partnership—may carry with it additional ramifications does not create a distinction which justifies exemption from Title VII. As the Ninth Circuit has recognized, eligibility to become a part-owner in a company is subject to Title VII when job opportunities are tied to such stock ownership. *Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297 (9th Cir. 1982). In *Bonilla* minority employees challenged their employer's policy of permitting only persons of Italian ancestry to own shares in the employer company, a garbage collection business. The complaint alleged that those shareholders who worked for the company assigned to themselves the management jobs and route driver positions which were considered the most desirable. *Id.* at 1300. Although the defendant argued that Title VII did not apply to discriminatory sale of its corporate stock, the court held to the contrary:

> "The Company's organization closely entangles stock ownership and employment privilege, but the predominant characteristics are those of employment. . . . At least a quarter of its employees are stockholders, each of whom binds himself or herself under the by-laws and stockholders' agreement to permanent, full-time employment." (*Id.* at 1302)

Thus observing the close ties between share ownership and employment, and noting the company's restriction on transfer of shares, the court held that under such circumstances "the admittedly discriminatory employment practices of the Company are within the reach of Title VII in spite of the effort to characterize those practices as 'proprietary rights.'" *Id.* at 1302-04. *See also EEOC v. First Catholic Slovak Ladies Association*, 694 F.2d 1068 (6th Cir. 1982) (eligibility for board of directors in non-profit organization subject to standards of Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (1967), when board membership is prerequisite to

appointment as a salaried officer)[5]; *Pettway v. American Cast Iron Pipe Co.*, 332 F. Supp. 811, 815 (N.D. Ala. 1970), *rev'd on other grounds*, 494 F.2d 211 (5th Cir. 1974) (right to serve as member of company management board which controlled shares of stock of company held to be "a valuable term, condition or privilege of employment at [company] and therefore falls within the express coverage of Title VII").

The decision in *Bonilla* goes further than the Court need go in this case. There, the opportunity for a more desirable position was controlled by the employee's status as an owner in the company. Under such circumstances, the court indicated that the company must extend to all its employees an equal opportunity to purchase stock. In this case, King & Spalding already has a policy of considering all its associates for partnership after a "reasonable period." Having thus made partnership an incentive for accepting and continuing employment with the firm, the partnership decision has become an integral part of an associate attorney's job opportunities. The ruling Amici urge would merely require that this existing opportunity be administered fairly. The fact that the decision also involves an in-

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[5] Although the district court believed it inappropriate to apply the ADEA to "an internal decision on who should govern and set broad policies for the organization" (*id.* at 1070), the court of appeals emphasized the work-related aspects of the position and held:

> "A determination of whether an individual is an employee and therefore covered by the protections of ADEA should not center on the label which the organization has chosen to give to the position. By emphasizing that these women held elected positions as officers and directors, the District Court failed to assess accurately their true status. These individuals performed traditional employee duties: maintaining records, preparing financial statements, managing the office. They were responsible for their work to the governing body of the organization and they drew salaries as employees. Their participation on the policy-making Board of Directors does not detract from their primary role as employees." (*Id.*)

Thus, where the principal obligations of a position are "traditional employee duties", the fact that the position also may be an elected post does not prevent application of the employment discrimination laws.

vitation to become part-owner of King & Spalding cannot be considered an impenetrable barrier to the application of Title VII, especially when the overriding aspect of a partner's role at the law firm is to continue practicing law.[6]

In a decision precisely on point with this case, the court in *Lucido v. Cravath, Swaine & Moore*, 425 F. Supp. 123 (S.D.N.Y. 1977), held that "the opportunity to become a partner at Cravath was a 'term, condition or privilege of employment' and an 'employment opportunit[y]' within the meaning of the Act." *Id.* at 127. In that case, as in the case now before the Court, the plaintiff had alleged that associates at Cravath were employed "with the understanding that after a reasonable period of time they will be afforded the opportunity of being promoted to partnership if they perform their duties as associate attorneys satisfactorily." *Id.* at 128. Given these facts, the court was led inexorably to the conclusion which is also required in this case: The opportunity to become a partner at the defendant law firm was a "term, condition or privilege" or "opportunity" of employment within the meaning of Title VII and must therefore be offered or declined based on factors which do not include race, color, sex, religion or national origin. *Id.*

This Court must decline King & Spalding's invitation to hold that law firm partnership may be denied because an associate is a woman (or black, or Native American, or a member of an otherwise-protected group). Such a result would

[6] This case, which arises in the context of a law partnership, provides an additional reason for recognizing close ties between ownership and employment. Because the Code of Professional Responsibility prohibits non-lawyers from owning or sharing in the profits from a business which engages in the practice of law (MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Canon 3 (1980); *id.*, DR 3-102 and DR 3-103), law firms are not organized by financiers who then hire management to run the company profitably for the benefit of the financiers. Instead, profit from the practice of law may only be paid to those who *practice* it.

It is ironic that Respondent's partnership form, which it urges requires a result which would indulge discrimination, derives historically from principles contained in the Code of Professional Responsibility, a code which counsels each attorney to conduct himself or herself so as to deserve "the respect and confidence of the members of his profession and of the society which he services . . . ." *Id.*, Preamble.

permit young attorneys to be thwarted in the development of their professional careers solely because of their race, color, sex, religion or national origin. Because discrimination-free career advancement is plainly the object of Title VII, law firm partnership, with its attendant benefits (increased income, increased responsibility and increased job security), should not be placed beyond the scrutiny of Title VII because of the partnership form which members of the legal profession frequently assume in order to carry on practice.

B. King & Spalding's "Up Or Out" Policy Makes Partnership A "Term" Or "Condition" Of Employment.

King & Spalding maintains another policy—that an associate who is considered and rejected for partnership must leave the firm. Complaint, ¶17(b) and (c) (R.10; J.A.12). This "up or out" policy—which plainly affects an associate's employment—provides an independent basis for applying Title VII to the consideration of Petitioner for partnership. In his dissent, Judge Tjoflat recognized that tying continued employment at King & Spalding to election to partnership had a direct bearing on Petitioner's discharge from employment. *Hishon v. King & Spalding, supra*, 678 F.2d at 1030 (Tjoflat, J., dissenting). Effectively, King & Spalding's policy makes partnership a "term" or "condition" of continued employment by a senior associate, within the meaning of Section 2000e-2(a)(1).

The courts have exhibited no reluctance to pierce to the core of a policy or practice which affects employment in order to determine whether it is contaminated by unlawful discrimination. Thus, for example, if a business makes stock ownership a prerequisite to assignment of the most desirable duties, it necessarily subjects the decision to permit or deny the right of stock ownership to the standards of Title VII. *Bonilla v. Oakland Scavenger Co., supra.* Likewise, a non-profit organization cannot make board membership a prerequisite to appointment as a salaried officer in the association unless board membership is unlimited by discriminatory strictures. *EEOC v. First Catholic Slovak Ladies Association, supra.*

The same scrutiny must be given to the discharge of Petitioner. When discharge of an employee results from the refusal to extend the opportunity of advancement, that refusal is subject to the standards of Title VII. Thus, in *Timper v. Board of Regents*, 512 F. Supp. 384, 394 (W.D. Wis. 1981), the court applied Title VII to a denial of tenure which had resulted in plaintiff's discharge pursuant to an "up or out" policy. *Cf. Delaware State College v. Ricks*, 449 U.S. 250 (1980) (limitations period begins with the decision to deny tenure to a professor, not when effect of that decision—eventual termination—occurs). Likewise, the decision not to offer partnership to Petitioner led directly to her termination and is subject to review.

Because King & Spalding makes election to partnership a condition for continued practice with the firm, Title VII demands that the decision to invite an associate into the partnership not be based on race, color, sex, religion or national origin. Any other result would insulate the dismissal of associates for discriminatory reasons, simply because the decision takes the form of rejection from partnership. That is, so long as a firm like King & Spalding *hires* women and minority lawyers as associates, it would be free to discharge all of them merely by declining partnership some years later. As Judge Tjoflat concluded, "when the partnership decision inextricably and inevitably *is* a decision whether to terminate employment, . . . Title VII applies." *Hishon v. King & Spalding, supra*, 678 F.2d at 1030.

III.

TITLE VII IS NOT UNCONSTITUTIONAL AS APPLIED TO KING & SPALDING'S CONSIDERATION OF PETITIONER FOR PARTNERSHIP.

In deciding that Title VII does not apply to the decision to make an associate lawyer a partner, both the district and circuit courts expressed paramount concern for King & Spalding's rights of free association. "The very essence of a partnership is the voluntary joinder of all partners with each other" (*Hishon v. King & Spalding, supra*, 678 F.2d at 1028), the Eleventh Circuit declared. "Even under the most liberal reading we cannot find the requisite congressional intent to permit Title VII's intervention into matters of voluntary association." *Id.* at

1026; *see also Hishon v. King & Spalding*, 25 Empl. Prac. Dec. (CCH) ¶31,703, at 20,064 (N.D. Ga. Nov. 28, 1980). Neither court was able to muster significant case or legislative support for its conclusion, however,[7] and the applicable precedent overwhelmingly demonstrates that the associational interests of King & Spalding are not entitled to the extreme solicitude shown by the courts below.

First, associational interests are by no means absolute. Rather, "even a '"significant interference" with protected rights of political association' may be sustained if the State demonstrates a sufficiently important interest and . . . avoid[s] unnecessary abridgement of associational freedoms." *Buckley v. Valeo*, 424 U.S. 1, 25 (1976). Thus, asserted associational interests often fall before the compelling governmental interest in prohibiting discrimination. *See, e.g., Runyon v. McCrary*, 427 U.S. 160 (1970) (racially exclusive private school subject to 42 U.S.C. § 1981); *United States Jaycees v. McClure*, 534 F. Supp. 766, 771 (D. Minn. 1982) (men's civic organization subject to Minnesota statute prohibiting, *inter alia*, sex discrimination by public business facility). Title VII, which "provides . . . a clear mandate from Congress that no longer will the United States tolerate . . . [employment] discrimination" (*Culpepper v. Reynolds Metals Co.*, 421 F.2d 888, 891 (5th Cir. 1970)), embodies such a compelling governmental interest. *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763 (1976) ("policy of outlawing . . . discrimination should have the 'highest priority'") (*quoting Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974)); *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 66 (1975) ("national labor policy embodies the principles of non-discrimination as a matter of highest priority"). By thus proscribing discrimination in private employment, Congress has "not run afoul of the First Amendment." *United States Jaycees v. McClure*, *supra*, 534 F. Supp. at 771; *see Norwood v. Harrison*, 413 U.S. 455, 470 & n.10 (1973).

[7] The District Court relied on dicta from Justice Goldberg's concurring opinion in *Bell v. Maryland*, 378 U.S. 226, 313 (1964) ("[I]t is the constitutional right of every person . . . to choose his social intimates and business partners solely on the basis of personal prejudices including race"), a case decided on June 22, 1964, *prior* to the enactment of Title VII on July 2, 1964. Pub. L. 88-352; 78 Stat. 253; 42 U.S.C. §§ 2000e *et seq.*

Congress has recognized that associational interests do exist in some employment situations, and has balanced those interests with the compelling national interest in eradicating employment discrimination by creating certain exceptions to the general proscriptions of Title VII. Thus, businesses of fewer than fifteen employees are exempt from coverage under Title VII (42 U.S.C. § 2000e(b)), as are bona fide private membership clubs (*id.* § 2000e(b)(2)),[8] and religious organizations may discriminate in favor of their adherents (*id.* § 2000e-1). Congress deemed that these discrete exemptions were sufficient to maintain the appropriate balance between associational interests and the generally overriding public interest in eliminating employment discrimination. Thus, in *Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297 (9th Cir. 1982) (*see* Section II(A), *supra*), the court held that shareholders in a large family-run concern did not have an associational interest which outweighed the compelling need for a broad application of Title VII:

> "We reject the Company's argument that its legitimate interest in protecting its family members overrides the countervailing national interest in eliminating employment discrimination based on race and national origin. . . .
>
> "We emphasize that our decision by no means interferes with the capacity of the proprietors of a small family-owned business, or, for that matter, any small business, to conduct its affairs with heightened solicitude for family or friends. . . . In 1972 Congress amended the section [42 U.S.C. § 2000e(b)] to exclude from coverage employers with fifteen or

[8] It is significant that the exemption for private clubs is construed exceedingly narrowly; even where one might expect associational interests to be strongest, courts have found the broad Congressional intent of eradicating discrimination to overcome all but the clearest examples of bona fide private membership clubs. *See Quijano v. University Federal Credit Union*, 617 F.2d 129, 132 (5th Cir. 1980) ("very precise and limited exception in Title VII" not applicable to a non-profit, tax-exempt membership credit union); *Fesel v. Masonic Home of Delaware, Inc.*, 428 F. Supp. 573 (D. Del. 1977) (private retirement home affiliated with private membership club); *Mills v. Fox*, 421 F. Supp. 519, 523 (E.D.N.Y. 1967) (private nursing home).

> fewer employees . . . . The inclusion of this provision demonstrates Congress's due regard for the special concerns of smaller businesses. . . . We will not dilute Title VII's imperative by altering the balance Congress has already struck." (*Id.* at 1303-04)

The lower courts' solicitude for King & Spalding's associational interests upsets this balance and supplies an additional exemption to the scope of Title VII not intended by Congress.

Any associational interests the King & Spalding partners have in choosing their partners are present in many other employment contexts covered by Title VII. No reason appears for the special deference for law partnerships evinced in the decision below, as compared with the many other equally "sensitive" or "collegial" settings in which Title VII proscribes employment discrimination. Thus, for example, Title VII is routinely applied to such positions as college faculty (*see, e.g., EEOC v. Tufts Institution of Learning*, 421 F. Supp. 152, 157, 164 (D. Mass. 1975)), bank officers (*EEOC v. Akron National Bank & Trust Co.*, 497 F. Supp. 733 (N.D. Ohio 1980)), firefighters (*Vulcan Society v. Civil Service Commission*, 490 F.2d 387 (2d Cir. 1973)), police officers (*Blake v. City of Los Angeles*, 595 F.2d 1367 (9th Cir. 1979), *cert. denied*, 446 U.S. 928 (1980)), prison guards (*Forts v. Ward*, 621 F.2d 1210 (2d Cir. 1980)), doctors (*Joshi v. Florida State University*, 646 F.2d 981 (5th Cir. 1981), *cert. denied*, 456 U.S. 972 (1982)), and other positions of a professional, supervisory or managerial nature (*Fisher v. Procter & Gamble Manufacturing Co.*, 613 F.2d 527, 543-46 (5th Cir. 1980), *cert. denied*, 449 U.S. 1115 (1981); *EEOC v. Rinella & Rinella*, 401 F. Supp. 175, 179-80 (N.D. Ill. 1975)).

Moreover, in the commercial context presented here, associational rights are entitled to substantially less solicitude than in the political or social context in which such rights have traditionally been recognized. *Lucido v. Cravath, Swaine & Moore*, 425 F. Supp. 123, 129 (S.D.N.Y. 1977). "[C]ommercial activity . . . occupies 'a subordinate position on the scale of First Amendment values' . . . ." *United States Jaycees v. McClure, supra*, 534 F. Supp. at 771 (*quoting Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 456 (1978)).

In all events, the First Amendment does not shield the practices at issue here. King & Spalding's protected associational interests do not include an interest in discriminating on the grounds proscribed by Title VII. Rather, this Court has declared that "the Constitution . . . places no value on discrimination . . . . Invidious private discrimination . . . has never been accorded affirmative constitutional protections." *Norwood v. Harrison, supra,* 413 U.S. at 469-70. Thus, in *Runyon v. McCrary,* 427 U.S. 160 (1976), the Court declared that, while the belief that racial segregation is desirable may be promoted and subscribed to under the protection of First Amendment principles, "it does not follow that the *practice* of excluding racial minorities from such institutions [holding those beliefs] is also protected by the same principle." *Id.* at 176. *See also United States Jaycees v. McClure, supra,* 534 F. Supp. at 771 ("While the Jaycees has a right to believe that its organization should only advance the interests of men, its practice of excluding women from equal benefits does not enjoy protection"). In short, equal employment opportunity is simply not to be subordinated to the "associational" interests of the members of the discriminating body. *United States v. International Longshoremen's Association,* 460 F.2d 497, 501 (4th Cir.), *cert. denied,* 409 U.S. 1007 (1972) (members of historically segregated unions had no protectable associational interests in preserving segregation).

For many of these reasons, the court in *Lucido v. Cravath, Swaine & Moore, supra,* 425 F. Supp. 123, determined that the First Amendment was no barrier to a claim identical to that presented by Petitioner. As that court concluded:

> "Application of Title VII to this case does not prevent the partners from associating for political, social and economic goals. The discretionary, subjective judgment that necessarily goes into the . . . partnership promotion process . . . [is] not limited by the application of Title VII except to preclude factors of race, color, religion, sex, or national origin from being considered in this promotion process." (425 F. Supp. at 129)

CONCLUSION

For all the foregoing reasons, Amici urge the Court to fulfill the mandate of Title VII that professional opportunity not be denied to lawyers on the basis of sex, race, religion, or national origin, and to reverse the decision of the court below.

DATED: May 9, 1983.

Respectfully submitted,

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No. 82-940

In The

Supreme Court of the United States

October Term, 1982

ELIZABETH ANDERSON HISHON,

Petitioner

vs.

KING & SPALDING,

Respondent

On Writ of Certiorari To The
United States Court of Appeals
For The Eleventh Circuit

BRIEF OF DALLAS ASSOCIATION OF BLACK WOMEN ATTORNEYS, DALLAS WOMEN LAWYERS ASSOCIATION, STATE BAR OF TEXAS WOMEN AND THE LAW SECTION, WOMEN'S ISSUES NETWORK, INC., BUSINESS AND PROFESSIONAL WOMEN'S CLUB OF DALLAS, INC., MEXICAN-AMERICAN BUSINESS & PROFESSIONAL WOMEN'S CLUB OF DALLAS, GREATER DALLAS SECTION OF THE NATIONAL COUNCIL OF JEWISH WOMEN, SOUTHERN METHODIST UNIVERSITY ASSOCIATION OF WOMEN LAW STUDENTS, WOMEN'S CENTER OF DALLAS, AS AMICI CURIAE

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May 6, 1983

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Amici respectfully submit this brief in support of petitioner.

INTEREST OF AMICI

The Women's Issues Network is an association that encourages and supports individuals and organizations in the Dallas area in particular and in Texas in general to advocate equal opportunity and advancement for women. The members of the Network represent several dozen organizations, each of which seeks to promote human dignity. The Network coordinated the filing of this brief.

The Dallas Association of Black Women Attorneys, the Dallas Women Lawyers Association, the State Bar of Texas Women and the Law Section and the Southern Methodist University Association of Women Law Students are each associations of lawyers or law students that seek to encourage women to study and practice law, expand employment opportunities for women lawyers, remove barriers to effective participation by women lawyers in the bar, and inform the bar and public of issues affecting women and women lawyers. Each association regularly presents public programs and seminars, acts to influence legislation, and provides women lawyers and law students a network. The law students' association in 1975 through 1980 sued four Dallas law firms, in which suits it asserted that the firms' employment practices violated Title VII of the Civil Rights Act of 1964.

The Business and Professional Women's Club of Dallas, Inc. and the Mexican-American Business & Professional Women's Club of Dallas are not-for-profit corporations that promote the interests and economic self-sufficiency of business and professional women by seeking elimination of restrictive and discriminatory work laws and the adoption of equitable terms and conditions of employment. As do the associations, the clubs present programs and seminars, act to influence legislation, and provide a network for women.

The Greater Dallas Section of the National Council of Jewish Women is an association that, in the spirit of Judaism, is dedicated to furthering freedom and welfare in the Jewish and general communities. The members of the Council provide essential social services and present educational programs to the community. The promotion of equal opportunity for employment and advancement is one of the Council's priorities.

The Women's Center of Dallas is a not-for-profit corporation that seeks to change society's expectations of women through research, education, counselling and communication. Past activities of the Center include employment counselling, teaching entry skills, providing a job bank and promoting job sharing.

SUMMARY OF ARGUMENT

Statutory "construction" requires more than an examination of text and original understanding. It requires an examination of subsequent legislative and administrative understanding of the text; of the values supporting the text; and of the role and competence of the courts in enforcing the text. Nothing short of such an examination gives a complete statement of the law. The meaning, or plain meaning, of text is important, but reliance on the meaning of text alone is contrary to historical judicial decision-making.

An examination of each source of construction shows that under Title VII an employer may not deny an individual eligibility for partnership because she is female. A reading of Title VII according to common usage shows that working at a law firm, whether as a partner or as an associate, is employment. Being eligible for partnership is a privilege or opportunity of such employment.

The debates and the reports of the Congress in 1964, when Title VII was enacted, and in 1972, when Title VII received plenary consideration, show that Congress understood that, unless the text made an exception, no distinctions would be made between more valued and less valued positions of employment, and all privileges and opportunities of employment would be protected from discriminatory decision-making. It is plain from these debates and reports

that the most valued positions of the professions were included within Title VII.

In enacting Title VII, Congress furthered fundamental American values of equality and fairness. We as a nation believe that decisions are to be made on merit and not class. Distinctions between jobs in high places and jobs in low places contradict the nation's values.

The federal courts, and this Court in particular, have an historical role in protecting individual rights. The Congress understood that role in giving the federal courts the principle role of enforcing Title VII. There are no issues in partnering cases that are beyond the competence of the federal courts.

ARGUMENT

I. STATUTORY "CONSTRUCTION" REQUIRES AT LEAST FOUR INQUIRIES: A. MEANING OF TEXT; B. INSTITUTIONAL UNDERSTANDING OF TEXT; C. VALUES SUPPORTING TEXT; AND D. COURT'S ROLE AND COMPETENCE.

We are in a time, last apparent in the 1930's and 1940's, of vigorous discussion about the legitimacy of the Court's standards of review. The discussion is most well known in the area of constitutional decision-making, where the discussion generally has concerned the appropriate rules of "scrutiny" applied to official action affecting life and liberty. See, e.g., Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 Stan. L. Rev. 843 (1978); J. Ely, Democracy and Distrust (1980). The discussion is less well known in the area of statutory decision-making, where the discussion has concerned the appropriate rules of "construction." See, e.g., G.

Calabresi, A Common Law for the Age of Statutes (1982); Note, Intent, Clear Statements, and Common Law: Statutory Interpretation in the Supreme Court 95 Harv. L. Rev. 892 (1982). It is understatement to note that the commentators, and the Justices of this Court, differ widely about the legitimacy of standards of review — whether they be rules of "scrutiny" or rules of "construction" — based on sources other than text and original understanding.

To illustrate the issue of legitimacy in statutory decision-making, we might ask which of the following questions is the correct way of putting the issue in this case: Do the statutory words "privilege of employment" and "employment opportunit[y]" include eligibility for partnership? Did the Congresses that passed Title VII and that considered and amended Title VII, and the agencies that have enforced Title VII, understand that partnerships would not be discriminatorily denied? Do the values of fairness and equality that Title VII validated and furthered allow a distinction between less valued positions of employment and more valued positions? Do our courts have the role and the competence to prevent segregation of our most valued positions of employment?

Each way of putting the issue, we submit, is partially correct. While the Court in statutory decision-making (and analogously in constitutional decision-making) has often emphasized the plain meaning and original understanding of text, it has never limited itself to those sources for its rules of construction. This Court has considered also the post-original understanding of a legislature that has given a statute plenary consideration, as well as the understanding of the agency that has enforced the statute, see *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 732-34 (1975);

the values from which the legislature drew and which the legislature in turn validated and furthered, see *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 427-35 (1968); and the role and competence of the courts in enforcing the subject matter of the statutes, see *J. I. Case Co. v. Borak*, 377 U.S. 426, 433-34 (1964).

While what the Court has done does not necessarily justify its repetition, the Court's consistent use of sources beyond text and original understanding — and historical acquiescence in their use — show that the Court, and perhaps the nation too, have long accepted at least two ideas: First, statutory text (and analogously constitutional text) is not a complete statement of the law; our skills of legislation are too unrefined, our language too imprecise, and our society too dynamic, for that. Second, our courts are sufficiently competent and even sufficiently representative to use other sources; it is plain, for example, that our judges are chosen or elected more often for their understanding of values than for their skill at legislative research. Just as the Constitution did not enact Mr. Herbert Spencer's Social Statics, it did not enact the school of jurisprudence that glorifies the plain meaning rule. It is appropriate to recognize that the Constitution did not prohibit or even discourage the judges of our courts from doing what historically has been the province of judging.

The time limit for submitting, and the cost of printing, a brief make it impossible to explicate each of the sources of construction that amici believe are legitimate. As amici representing hundreds of professional women and men from Texas, we do wish to emphasize one source as especially worthy of examination. We submit that an examination of the values (not just the purposes) of a statute is within

the historical province of judicial decision-making. Values support the principles, policies and interests which form the discourse within and without our institutions. Courts must take care, as we all must, in finding and applying values, but they must not exclude them because of the delicacy of the task.

II. AN EMPLOYER MAY NOT DENY AN INDIVIDUAL ELIGIBILITY FOR PARTNERSHIP BECAUSE SHE IS FEMALE.

A. *Meaning of Text*

The text of Section 703(a) of the Civil Rights Act of 1964 provides:

> It shall be an unlawful employment practice for an employer —
>
> (1) . . . to discriminate against any individual with respect to his . . . privileges of employment because of such individual's . . . sex . . .; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individual's . . . sex . . . .

Contrary to the court of appeals, we do not believe that the textual issue is whether a partner is an "employee." Cf. *Sibley Memorial Hospital v. Wilson*, 488 F.2d 1338 (D.C. Cir. 1963) (Section 703(a) not limited to "employees," past, present or potential). Under Section 703(a)(1), an "employer" may not discriminate against an "individual" regarding "privileges of employment." Under Section 703(a)(2), an "employer" may not deprive an "individual" of "employment opportunities" by discriminatorily classifying "employees or applicants for employment." Because under Section 701(a) and (b) an "employer" may be a partnership,

and because petitioner is an "individual," the textual issue is what are "privileges of employment" and "employment opportunities." Do they include eligibility for partnership? Is being a partner "employment"?

To answer these questions, it is appropriate to examine the common usage of the word "employment." The court of appeals, in deciding whether a partner is an "employee," examined the usage of "employee" at common law rather than in common usage. *Hishon v. King & Spalding*, 678 F.2d 1022, 1027-28 (11th Cir. 1982) ("traditional partnership principles"). But unless the text refers to a specialized usage instead of the common usage, which here it does not, and unless the institutional understanding refers to such a specialized usage, which here it has not, see pp. 9-10 *infra*, the common usage is proper.

In common usage, "employment" is an "activity in which one engages and employs his time and energies" and the "state of being employed," i.e., engaged. Webster's Third New International Dictionary 743 (P. Grove ed. 1966). As applied to Section 703(a), "employment" is the activity in which the individuals within the employer's enterprise are engaged and employ their time and energy. In the case of a law firm, the activity is the group practice of law. In common usage, both partners and associates are in "employment" at law firms.

"Privileges" and "opportunities" of "employment" quite simply are the privileges and opportunities arising out of the activity. In the case of a law firm, the privileges and opportunities include greater remuneration and, perhaps, greater control of case selection or direction. These privileges and opportunities arise commonly at several stages of "employment," at senior associateship, junior partnership, and senior partnership, and many stages in between.

The court of appeals' usage would distinguish positions of employment at entities, large and small, across the nation, and include the less valued positions within Section 703(a) and exclude the more valued positions. Indeed, under the court of appeals' approach, to determine whether an "associate" is an "employee," it would be important to know whether he or she draws a salary or draws only a share of what he or she brings in and/or works on. Under the court of appeals' approach, it would be important to know whether a partner supervises the associate or gives the associate a file and says, "I don't want to see it again." Under the court of appeals' approach, many "associates" at our largest firms would not be "employees." The text, in common usage, however, makes no such distinctions.

B. *Institutional Understanding*

The Congress and the agencies may show their understanding of the textual issue in at least three ways: The Congress may indicate whether the common usage or some specialized usage of textual words should be examined. The Congress may itself provide its understanding or some guidance as to its understanding of the textual issue. The enforcement agency's practice and interpretation may provide its understanding of the textual issue. The court of appeals rejected one of these sources and ignored the other two.

First, the Congress indicated that an examination of the common usage of words would give an understanding of text. During the Senate consideration Senator Clark, floor manager of Title VII, responded to a set of questions put by Senator Dirksen. Asked who an "employer" was, Senator Clark responded that "employer" was "intended to have its common dictionary meaning, except as expressly qualified by the act." 110 Cong. Rec. 7216 (Apr. 8, 1964). If "em-

ployer," a word *defined* in the Act, was to have its common dictionary meaning, then it is very likely that "employment," a word undefined, was to have its common dictionary meaning too. Nonetheless, the court of appeals dismissed Senator Clark's statement as "but a single remark." *Hishon v. King & Spalding*, 678 F.2d 1022, 1027 (11th Cir. 1982).

Second, it is plain both in 1964, when the Act was passed, and in 1972, when the Act received plenary consideration, that the Congress understood that, subject only to a few stated exceptions, no distinctions would be made between more valued and less valued positions of employment, and that all privileges and opportunities of employment were included within Section 703(a)'s protection. In 1964, the Congress stated that the entire Act was intended to be "general in application . . . ." H.R. Rep. No. 914, 88th Cong., 2d Sess., 2 U.S. Code, Cong. & Adm. News 2393 (1964). Within Title VII, the only positions of employment removed from coverage were certain positions of elective office, 42 U.S.C. 2000e(f), and in religious institutions, 42 U.S.C. 2000e-1, and positions with the United States and private membership clubs, 42 U.S.C. 2000e(b). The only privileges and opportunities removed from competition on the basis of merit were those subject to a bona fide seniority system, 42 U.S.C. 2000e-2(h), and those designated as preferential programs for Indians, 42 U.S.C. 2000e-2(i).

So well understood was Title VII's general application to employment, subject only to the above-described express exceptions, that in 1964 several members of the House Judiciary Committee noted Title VII's application to lawyers and law firms. H.R. Rep. No. 914, 88th Cong., 2d Sess., 2 U.S. Code, Cong. & Adm. News 2476 (1964) (views of Reps. Poff & Cramer); *id.* at 2516-17 (views of Reps. McCulloch et al.). And so well understood was Title VII's

continued general application that in 1972, an amendment was proposed and defeated to exclude certain professionals from coverage, namely, physicians and surgeons. 118 Cong. Rec. 3800-02 (Feb. 14, 1972) (colloquy of Sens. Ervin, Williams, Pastore & Javits).

Finally, the Equal Employment Opportunity Commission, an agency with enforcement responsibility over Title VII, has understood that an "individual" need not be an "employee" in order to complain under Title VII. It has held, for example, that an applicant for a license could complain against a state licensing board, notwithstanding the absence of an employer-employee relationship between the applicant and the board. EEOC Dec. 75-249, CCH EEOC Dec. ¶ 6457 (1975).

C. *Values*

The values that supported the Civil Rights Act of 1964, and Title VII in particular, were then, and are now, fundamental to the nation. There was "a growing recognition," the Congress said in 1964, "on the part of all of our people of the incompatibility of . . . discrimination with our ideals and the principles to which this country is dedicated." H.R. Rep. No. 914, 88th Cong., 2d Sess., 2 U.S. Code, Cong. & Adm. News 2393 (1964).

Supporting Title VII were the related values of equality and fairness. Title VII declared that distinctions based on race, color, religion, sex and national origin always, or nearly always, have no relation to the merits of an employment decision. As this Court has said: "The objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of . . .

employees over other employees." *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971). At the same time, Title VII declared that important decisions in our society, at least respecting employment of individuals, are to be made on the merits. Criteria must be bona fide and necessary, not frivolous. As this Court has also said: "The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and . . . neutral employment and personnel decisions." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973).

We as a nation have always believed, or said we believed, in equality and fairness, in rewarding merit and not class. We said in the Constitution that neither the United States nor any State may grant any "Title of Nobility." Art. 1, §§ 9, 10. The qualifications for our highest elective offices were simply citizenship, residency and age. We made it the national gospel that anyone could become President.

We have believed that anyone can "make it," that there are no positions or privileges that are beyond reach. If a person, black, brown, or white, female or male, has the skill and extends the effort, she or he can "rise to the top." It may be in sports. It may be in the arts. It may be in business. Or it may be in the professions. Horatio Alger takes many forms.

This Court has recognized that we believe in merit and not in class. It has not allowed our most valued institutions to be segregated. Compare *Mississippi University for Women v. Hogan*, 102 S.Ct. 3331 (1982) (nursing school); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (medical school), and *Runyon v. McCrary*, 427

U.S. 160 (1976) (private schools), with *Brown v. Board of Education*, 347 U.S. 483 (1954) (public primary and secondary schools). It is no accident that before *Brown* this Court decided *Sweatt v. Painter*, 339 U.S. 629 (1950) (law school). If everyone was to have an equal opportunity to be a lawyer, then everyone would have to have an equal opportunity to become qualified for law school.

The court of appeals' decision would recognize that our most valued positions and privileges of employment may be segregated by class and not merit. In the arts, we now have female orchestra conductors and company directors. In business, we now have female presidents and directors of major corporations. And in the legal profession, we now have female deans of law schools and female federal and state supreme court judges. But the court of appeals' decision would allow those who wish to classify by sex or other class to segregate such positions and privileges again.

Law schools, law firms, and the courts were once segregated by race, color, religion, sex and national origin. See C. Epstein, Women in Law (1981). There were quotas on the admission to law school of blacks and browns, women and Jews. There were gentile and Jewish law firms. Blacks brought suit to end law school segregation, *Sweatt v. Painter*, 339 U.S. 629 (1950), and generally women brought suit to end law firm segregation, *Kohn v. Royall, Koegel & Wells*, 496 F.2d 1094 (2d. Cir. 1974); *Southern Methodist University Association of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707 (5th Cir. 1979); *Lucido v. Cravath, Swaine & Moore*, 425 F. Supp. 123 (S.D.N.Y. 1977) (Italian-American male). It would be tragic for the nation to return to the days of segregation in high places.

D. *Court's Role and Competence*

From the beginning this Court, and subsequently the lower federal courts, have had a prominent role in the protection of individual liberty. It is a role plain from the grant of jurisdiction in article III and the contemporary ratification of the Bill of Rights. See J. Choper, Judicial Review and the National Political Process c.2 (1980). It is a role more plain from the historical practice of the people and response of the courts.

In the Civil Rights Act of 1964, and in Title VII in particular, the Congress assigned to the federal courts the principle enforcement role. While an agency was formed to investigate, conciliate and sometimes litigate, the agency's findings were not to be binding, and its recommendations advisory only. The role assigned to the federal courts was similar to the role assigned to them in the Reconstruction legislation, where the Congress asked the courts to protect individual dignity, equality, and citizenship, and which the courts neglected for too long.

Title VII cases raise difficult issues, and cases involving selection of partners will be no exception. But the Court has been well able to decide difficult questions of standards, *Dothard v. Rawlinson*, 433 U.S. 321 (1977); of statistics, *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977); of remedies, *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976); and of confidentiality, *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590 (1981). There is nothing in any of the litigated lawyering cases that shows that the courts will be unable to decide the questions arising in such cases. To the contrary, it is likely that the courts will be well able to determine whether there has been a decision based on class and not the merits and will be well able to order that such decisions be made fairly and equally.

CONCLUSION

For the above reasons, amici submit that eligibility for partnership cannot be denied on the basis of race, color, religion, sex or national origin. We respectfully submit that the court of appeals' decision to the contrary should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ELIZABETH ANDERSON HISHON,

Petitioner,

v.

KING & SPAULDING, A Partnership,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

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NO. 82-940

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

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ELIZABETH ANDERSON HISHON,

Petitioner,

v.

KING & SPAULDING,
A Partnership,

Respondent.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

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STATEMENT OF INTEREST OF AMICUS CURIAE [1]

The NAACP Legal Defense and Educational Fund, Inc. is a non-profit corporation, which was established for the purpose of

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1/ Consent has been granted by both the petitioner and the respondent for the filing of this amicus curiae brief.

assisting Black citizens in securing their consitutional civil rights. Its attorneys have represented parties and participated as amicus curiae in numerous cases before this Court involving various facets of the law.

Amicus interest in the outcome of this case is twofold. First, the Legal Defense Fund is acutely aware of the gross underrepresentation of Blacks in the legal arena, resulting from historical and persistent patterns and acts of racial discrimination. Amicus recognizes the need for Black attorneys to participate fully in all aspects of the legal community. For example, we recognize that due to their race, Blacks have been excluded from practicing in the nation's law firms, the bastions of the legal world.

The Legal Defense Fund has appeared before this Court as amicus curiae in cases addressing the need to protect and guarantee the civil rights of Blacks engaged in the legal profession. E.g. De Funis v.

Odegard, 416 U.S. 312 (1974); NAACP v. Button, 371 U.S. 415 (1963).

Amicus second interest is that this case may have far-reaching implications on the scope of Title VII in other litigation involving professionals and professional institutions. An affirmance would sound a death knell to Black lawyers seeking entry into or advancement within law firms, by notifying employers who discriminate that they were immune to the scrutiny of Title VII. Such a conclusion could have severe negative ramifications not only on the legal profession, but in other professional institutions as well.

SUMMARY OF ARGUMENT

This case raises a single narrow issue: whether a federal court is totally without power under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq., to take jurisdiction of an employee's claim that she or he was denied promotion to a

partnership position with a law firm and consequently discharged by the employer solely on the basis of race, color, religion, sex or national origin. The resolution of this issue turns primarily on the construction and application of several statutory terms found in Title VII. Fully supporting the statutory interpretation set forth in Petitioner's brief, the arguments here focus on the special significance of this case to blacks.

Historically, the legal profession has been one of the most racially segregated occupational groups in American society. During the century preceeding the passage of the Civil Rights Act of 1964, minorities were excluded from the legal profession or relegated to a second-class professional status as a result of overt racial discrimination on the part of educational and professional institutions, including employment discrimination by large law firms. This history of institutionalized discri-

mination was well recognized at the time Title VII was enacted and was precisely the type of racial injustice that the Civil Rights Act of 1964 was intended to remedy. In the absence of any express statutory exemption, Title VII should not be read to immunize any segment of the legal profession from Congress' mandate of equal opportunity in the work force.

Since 1964 a decline in the openly racist practices of legal institutions has facilitated some increase in the number of black lawyers. Nonetheless, many law firms continue to discriminate in the hiring and promotion of minority lawyers, frequently relying on racially premised assumptions regarding the ability of minorities to "fit in" with non-minority clients and co-workers. Such discrimination has denied black laywers access to the most important and lucrative areas of practice and has contributed to a perpetuation of the historic under-representation of blacks in the

legal profession. The creation of a special partnership exception to Title VII coverage will not only encourage a perpetuation of this covert segregation, but will authorize law partnerships to once again engage in the deliberate overt discrimination that flourished prior to 1964. Unless Title VII is read to provide law firm associates with some assurance that they will not be denied partnership and discharged because of their race, blacks will be understandably reluctant to seek employment with firms and will be generally discouraged from entering the legal profession. The terms of Title VII should not be construed in a manner which undermines the purpose of the Act to protect individuals from discriminatory treatment and eliminate racially stratified job environments.

ARGUMENT

I

IN ENACTING TITLE VII, CONGRESS WAS AWARE OF THE INTENTIONAL DISCRIMINATION WITHIN LAW PARTNERSHIPS AND ITS ROLE IN PERPETUATING PAST RACIAL INJUSTICE

A. Prior to 1964 Overt Racial Discrimination Was Prevalent Throughout the Institutions Which Trained, Regulated, and Employed Lawyers.

In some respects, the historical lack of black lawyers can be attributed to the general discriminatory attitude common throughout American society. During the century before the Civil Rights Act of 1964 a socialized acceptance of black inferiority by judges, jurors, clients stood as a constant barrier to the successful practice of the law by blacks.[1/] However, a more direct and in many respects more powerful set of racial barriers was purposefully erected by the institutions that controlled access to legal practice.

In 1963, Secretary of Labor Willard Wirtz labeled the legal profession "the worst segregated group in the whole economy

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1/ See e.g., G. Myrdall, An American Dilemma, 325-26, 550,325-26, 550, 801-02 (1944); C.G. Woodson, The Negro Professional Man and the Community, 184-239 (1934); J. Comer, Beyond Black and White 11 (1972).

or society."[2/] This segregation was the result of a succession of overt racial barriers erected by the institutions that controlled access to legal practice. Through policies set first by legislatures and courts, and then by law schools, bar associations and large law firms, blacks were excluded from practicing law and forced to the "fringe of the profession."[3/]

A similar conclusion drawn by an American Bar Foundation study was that "the latent racism which has accumulated in all major American social institutions also

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2/ Reported in G. Segal, Blacks in the Law, 24 (1983); Paone and Reis, Effective Enforcement of Federal Non-Discrimination Provision in the Hiring of Lawyers, 40 U.S. Cal. L. Rev. 615, 616 (1967).

3/ Gellhorn, The Law Schools and the Negro, 1968 Duke L.J. 1069, 1070; Baker, Black Lawyers and Corporate and Commercial Practice: Some Unfinished Business of the Civil Rights Movement, 18 How. L.J. 685, 692 (1975) ("The major reason for the lack of Black lawyers today is traceable to both state enforced and institutionalized racial discrimination.").

pervades the legal profession." 4/ In determining the applicability of Title VII to this case and attempting to promote the legislative objective "to eliminate so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history," Albermarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975), the discriminatory history of the profession and the role of law partnerships in that history cannot be ignored. It is thus "appropriate ... to look down the corridor of history and rcognize that so many for so long failed to deal with the racial injustices around them." A.L. Higginbotham, Jr., Racism and the Early American Legal Process, 1619-1896, 407 Annals, 1, 17 (May 1973).

The earliest racial restrictions on the practice of law were imposed in state courts and legislatures. These state imposed racial restrictions continued even after the

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4/ M. Goldman, A Portrait of the Black Attorney in Chicago, 49 (1972).

ratification of the Civil War Amendments. In Maryland, for example, a law requiring an applicant for the state bar to be a "free white male citizen" was re-enacted in 1872 and 1876.[5/] This Act was construed to prohibit all blacks from practicing law in Maryland, even those who had previously been admitted to the bar of another state. In Re Charles Taylor, 48 Md. 28 (1877). The Maryland Court of Appeals relied on the decisions of this Court in Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873) and The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), to affirm the constitutionality of the state law. 48 Md. at 30-32. This absolute exclusion of blacks from the legal profession in Maryland

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5/ See Md. Code 1860, Art. 11, 30; repealed and reenacted without change to relevant portions by Act of 1872, Ch. 91 3 and Act of 1876, Ch. 264, §3. No other profession was restricted by law in post-Civil War Maryland. See B. Kroger, The Negro Lawyer in Maryland 3 (1948).

continued until 1885.[6/]

State enforced restrictions, along with the general racial animosity of which those restrictions were both a symptom and a cause, limited black lawyers in the nineteenth century to a scattered handful.[7/] Although there were some bright spots signaling the emergence of a black bar during the Reconstruction period -- including the graduation of George Ruffin from Harvard Law School and the opening of Howard University Law School, both in 1869 -- these prospects were too few to provide any meaningful employment opportunities to blacks as a whole. The few blacks who were able to penetrate the legal profession's ivory tower

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6/ B. Kroger, supra note 5, at 3 (discussing unpublished opinion of the Supreme Bench of Baltimore City which "virtually overruled the Maryland Court of Appeals decision in In Re Charles Taylor, supra).

7/ See generally W. Leonard, The Development of the Black Bar, 407 Annals 134 (May 1973). Tollett, Black Lawyers, Their Education, and the Black Community, 17 How. L.J. 326 (1971).

were those, like John Mercer Langston, who combined an extraordinary amount of talent and determination with a degree of good fortune that was rarely bestowed upon blacks of this period.[8/] Even in the absence of legislation, state courts in the nineteenth century frequently refused to accredit black lawyers.[9/]

As state laws directly barring blacks access to the legal profession were challenged and forced to collapse, states began to require that bar applicants have law degrees. Many states and private law schools, however, continued to refuse to admit blacks during the first half of the twentieth century and hence the difficulty

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8/ Id.

9/ See, e.g., M. Bloomfield, American Lawyers in a Changing Society, 1776-1876, 312-315 (1976)(Ohio court admitted John Mercer Langston to bar in 1854 only after a visual examination of applicant convinced the court that he possessed more white than Negro blood); see generally W. Leonard, Black Lawyers (1977).

in obtaining legal education became the "fundamental discouragement" excluding blacks from the practice of law. G. Segal, supra note 2, at 1; see also Gellhorn, supra note 3, at 1069 (Northern law schools were only "nominally open" to blacks, and most Southern law schools were "completely closed to the Negro until the 1950's.")

Discrimination in law schools originally took the form of state laws and official policies that absolutely prohibited black enrollment in "white" institutions. These formal racial standards were challenged and invalidated one by one during the two decades leading up to Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).[10/]

10/ University of Maryland v. Murray, 169 Md. 478, 182 A.2d 590 (1936) (ordering state law schools to admit black applicant, but leaving open possibility that state might satisfy its constitutional obligations by providing blacks with grants to attend out-of-state schools.) Missouri ex rel Gaines v. Canada, 305 U.S. 337 (1938) (invalidating state law that excluded blacks from state law school, despite state subsidy for out-of-state legal education for

Yet, even after this Court's explicit rejection of the "separate but equal" doctrine, many law schools persisted in refusing to consider black applicants.[11] It was not until 1964 that the Association of American Law School's Committee on Racial Discrimination could state that no member school reported a policy of denying admission on the grounds of race or color. AALS Proceedings, 1964, Part One: Reports of Committees 159. See also Civil Rights, Report of United States Commission on Civil Rights

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10/ continued

blacks. The response to these cases by Missouri and by a number of other states was to set up separate in-state law schools for blacks. These schools were generally recognized as inferior and further suits were necessary to force states to abandon their formal policies of discrimination. Sipnel v. Board of Regents of University of Oklahoma, 332 U.S. 631 (1948); Fisher v. Hurst, C.I., 333 U.S. 147 (1948); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950). See also LeFlar, Legal Education: Desegregation in Law Schools, 43 A.B.A.J. 145 (1957) (citing additional cases).

11/ W. Leonard, supra note 7, at 145-47.

118 (1963) (most law schools have either totally excluded Blacks or admitted only token numbers). Even more significant is the fact that progress was not actually made toward raising the black enrollment in American law schools until 1968. G. Segal, supra note 2, at 5-7.

Black lawyers were also flatly denied admission to most national, state, and local bar associations through the first half of the twentieth century. This racial exclusion denied minority lawyers professional contact with the main body of the bar, advanced the racial stratification of an already white-dominated occupation, and forced blacks to organize separate professional associations.[12/]

12/ In response to the discrimination of traditionally white professional associations, black lawyers organized the National Bar Association in 1925, as well as local bar assocations in nearly every major city. Ortique, The National Bar Assocation -- Not Just an Option, 53 Judicature 390 (1970).

The American Bar Association was publicly confronted with the issue of race for the first time in 1912 when the ABA executive committee unknowingly admitted three black lawyers to membership in the Association. Informed of its oversight, the executive committee immediately rescinded the admissions, stating that "the settled practice of the Association has been to elect only white men to membership." G. Segal, supra note 2, at 17; J. Auerbach, Unequal Justice 65 (1976). Although the executive committee's recission was rejected on procedural grounds, and the memberships affirmed, by a resolution at the ABA's 1912 annual meeting, this resolution made clear that the election "was by inadvertance" and that "it has never been contemplated that colored men were to be members of the Association." 37 A.B.A. Reports, 1912, 13, 93, 95. The resolution also directed that henceforth those recommending a black lawyer for membership should "accompany the recom-

mendation with a statement of the fact that he is of such a race." Id. at 13.[13/]

It was not until 1943 that this openly racist policy was dropped and the ABA began to consider black applicants for membership. G. Segal, supra note 2, at 19. An entire decade passed before black lawyers were accepted as active participants in the Association. Id. See also Ortique, supra note 12, at 392.

Similar policies excluded black lawyers from bar associations at the local level. For instance, the Bar Assocation of the District of Columbia maintained an official policy of segregation until 1958. Blacks Moving into Key Legal Posts, Washington Post, April 11, 9176, at A-1, 19. Despite the fact that Washington D.C. was the center of legal education for blacks, black lawyers

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13/ The motivation behind this disclosure requirement was made plain by the Assocation's membership chairman who baldly stated that the admission of blacks posed "a question of keeping pure the Anglo-Saxon race." J. Auerbach, supra p. 16, at 66.

were barred from the library in the federal courthouse in that city until a lawsuit was instituted. U.S. ex rel. Robinson v. Bar Assocation of the District of Columbia, 197 F.2d 408 (D.C. Cir. 1952). In the same tradition, Black students were not permitted to attend review courses offered prior to bar examinations. G. Segal, supra, note 2 at 196. In like manner, blacks were expressly excluded from the Chicago Bar Association until well after World War II. M. Goldman, A Portrait of the Black Attorney in Chicago 35-36 (1972). (This policy reflected the "direct hostility" and racial prejudice of many of the organization's most influential members, who were also among the city's most prominent corporate attorneys."). The evolution of separate black bar assocations across the country -- Harlem Lawyers Association, Blackstone Law Club, Houston Lawyers Association, Louis A. Martinet Legal Society, and many others -- attests to widespread discrimination by

professional associations. While the proclaimed ethics of these local assocations supported the ideal of equal justice for all, their actions manifested deep-seated hositility to blacks. Quite simply, racism was elevated above professionalism. See J. Auerbach, supra p. 16 at 66. It is not surprising that as late as 1963 the United States Commission on Civil Rights reported that black lawyers were "severely limited" in their opportunities for bar assocation participation.[14/]

With the proliferation of corporate and commercial law firms in the twentieth century and the growing domination by these firms of the most lucrative areas of prac-

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14/ Civil Rights, U.S. Commission on Civil Rights 119 (1963):

> The opportunities for professional contacts and continuing legal education that attend bar assocation membership appear to be severely limited for Negro lawyers ... Even where Negroes are admitted to membership, they are usually excluded or discouraged from participation in social and education programs sponsored by the associations.

tice, especially within associations located in metropolitan areas, the discriminatory employment practices of these firms came to play an increasingly central role in the racial stratification of the bar. Prior to the enactment of Title VII, overt racial discrimination by law firms confined most black lawyers to the least desirable areas of practice at the "fringe of the profession" -- criminal, domestic relations and small claims. Gellhorn, supra note 3, at 1070; M. Goldman, supra note 4, at 6.

By 1960 there were still barely 2000 black lawyers, comprising slightly more than 1% of the legal profession.[15/] Denied "the social, economic and political rewards of the white legal profession," W. Leonard, Black Lawyers, 214 (1977), the majority of these black lawyers operated in what G. Franklin Edwards in his 1959 study of the

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15/ U.S. Bureau of the Census, 1960 Census, Vol. 1, Pt. 1, Table 205, pp. 1-544; Statistical Abstract of the United States, 1969 at 24.

opportunities available to black lawyers labeled a "starvation profession." G.F. Franklin, The Negro Professional Class 135 (1959).

That this professional stratification and racial segregation is attributable in large part to discriminatory employment practices on the part of white law firms has been widely recognized. See, e.g., Shuman, A Black Lawyer Study, 16 How. L.J. 225, 20 (1971) ("the most prominent factor obstructing Blacks from successful private practice is discrimination by large established White firms."); M. Goldman, supra note 4, at 6 (American Bar Foundation study concludes that "[t]he persistence of formal and informal policies of segregation within most white law firms and local corporations has ... placed major limits on opportunities for black attorneys."); Baker, supra note 3, at 691 (black lawyers "were virtually excluded from large and medium size law firms until the mid-sixties", resulting in "second-class

the mid-sixties", resulting in "second-class status"), E. Smigel, The Wall Street Lawyer, 45 (1964) (study finds only three black lawyers employed by large New York firms.)

Moreover, the refusal to hire minorities cannot be attributed to the low number of blacks graduating from prestigious law schools prior to 1964. Amicus is familiar with numerous black lawyers who graduated with impressive academic records from highly respected law schools and were flatly rejected by corporate firms.[16/]

16/ One blatant example, which has drawn public attention, is William T. Coleman, Jr. Despite the fact that Mr. Coleman graduated magna cum laude from Harvard Law School and was an editor of the Harvard Law Review, he was unable to find employment with any major Philadelphia law firm in 1946. G. Segal, supra note 2, at 32, 77-78, 218-219. Coleman went on to clerk for Judge Goodrich of the U.S. Court of Appeals for the Third Circuit (1947-48), and then for Justice Frankfurter as the first black law clerk to this Court. Id. Even with this background, Coleman was turned down by a number of New York law firms before finally finding employment with a firm in that city. Clark and Clark, The Black Lawyer -- A New Day, But Slow in Dawning, in Minority Opportunities in Law for Blacks, Puerto Ricans and

In a survey of 120 Northern law firms conducted by the Harvard Law Record in 1963, many firms openly admitted that race was a central criterion used in hiring. The Firms -- What Do They Want, Harvard Law Record, Vol. 37, no. 9, 1, 8-9 (Dec. 12, 1963). The firms were asked to rate different qualities on a scale between +10 and -10, with +10 representing a characteristic that in and of itself would assure an applicant of a job offer, and -10 designating a characteristic that would lead to an automatic rejection. On an average, the firms gave a -3.5 rating to the "Negro" trait, confirming the overt nature of law firm discrimination against blacks. Id. at 8-9 A number of firms emphatically commented that, when hiring

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16/ continued

Chicanos 256 (1974). Similiarly, Judge A Leon Higginbotham, Jr., a 1952 graduate of Yale Law School was repeatedly denied employment with Philadelphia labor law firms. Id. at 256-257; see also, W. Leonard, supra note 9, at 32.

associates, they looked for "an intelligent white male." Id. at 8.

Secretary of Labor W. William Wirtz acknowledged the overt discrimination within law firms at the time of the enactment of Title VII. In a speech before the Association of American Law Schools in December, 1963, he declared that "the legal profession has got a lot to answer for" with respect to the "racial barriers" that exclude blacks from the practice of law. A.A.L.S. Proceedings, 1963, Part Two 100 (reporting that a Department of Labor Study found only thirty-five firms in the entire country which employed a black lawyer.) Wirtz emphasized that an elimination of existing intentional discrimination within law firms was an essential prerequisite to any integration of the profession. He told his audience of educators that their efforts to increase the number of black law students would be doomed to failure until law firms were willing to offer blacks an equal op-

portunity incentive to pursue a career in law. Id.[17/]

The United States Commission on Civil Rights also gave special attention to the plight of black lawyers in its 1963 Report. Civil Rights, Report of United States Commission on Civil Rights (1963). The Commission noted that blacks in many states "have faced difficulty in gaining admission to law schools, impediments to admission to the bar, and severe limitations on their professional association and contacts." Id at 118.

An American Bar Foundation study concluded that "the latent racism which has accumulated in all major American social

17/ See also Carl and Callahan, Negroes and the Law, 17 J. of Legal Ed. 250, 254 (1964-65) (Motivation [to go to law school] implies a strong desire to learn with the hope or knowledge that one's effort and determination will be satisfied by rewards of a profession: social status, respect, the opportunity to render service, as well as the acqusition of some of the comforts and pleasures of life..."); G. Myrdal, supra note 7, at 325-26, 550, 801-02; C. Silberman, Crisis in Black and White (1964).

institutions also pervades the legal profession." M. Goldman, supra note 4 at 49. The overt discrimination that was openly displayed by law firms prior to the enactment of Title VII played a major role in denying black lawyers access to important areas of practice and perpetuating a racially stratified profession.

B. Congress Chose Not to Create An Exemption to Protect the Discriminatory Practices of Law Partnerships

As the Court has repeatedly recognized, "[t]he primary purpose of Title VII was 'to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.' McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 [1973], "International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977). In achieving this objective, Title VII was intended to "eliminate discrimina-

tory effects of the past as well as bar discrimination in the future." Albermarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (quoting Louisiana v. United States, 380 U.S. 145 (1965)).

The Court of Appeals below, after admitting that "[n]either the statutory language nor the legislative history of Title VII greatly illuminate its decision in this case, 678 F.2d, at 1027, presumed that Congress intended to exempt partnership decision from Title VII scrutiny.[18/]

This presumption regarding congressional intent is directly contrary to the overall objectives of the Act. In the light of the recognized discriminatory history of the legal profession prior to 1964, ante at

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18/ The majority opinion for the divided Court of Appeals refused to recognize Title VII jurisdiction in the absence of a showing of "the requisiste congressional intent to permit Title VII's intervention." 678 F.2d, at 1026. Thus, it is clear that the majority opinion approached this case with an implicit presumption, albeit rebutable, that Title VII was not intended to reach partnership decisions.

6-26, an exemption of partnership decisions would have frustrated the central statutory purposes of eliminating racial discrimination from the workplace and eradicating its past effects.

Indeed, the discriminatory policies that Congress undoubtedly observed within law firms in 1964 reflected precisely the kind of discrimination that Title VII was most directly designed to address. Intentional discrimination, such as that openly demonstrated by law firms prior to 1964, ante at 21-26, was "the most obvious evil Congress had in mind when it enacted Title VII. International Brotherhood of Teamsters v. United States, 431 U.S., at 335 n. 15. Moreover, by excluding blacks from the most lucrative areas of legal practice, law firms perpetuated the long-standing racial stratification of the bar and "operated[d] to 'freeze' the status quo of prior discriminatory practices." Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971), ante at 6-26.

In the absence of a "clear congressional mandate" to the contrary, Title VII should be read to be "broadly inclusive," County of Washington v. Gunther, 452 U.S. 161, 170, 178 (1981); it should not be assumed that Congress knowingly intended to sanction intentional discrimination that would undermine the effectiveness of the Act.

That Congress did not intend to exempt partnership decisions from Title VII scrutiny is strongly supported by the fact that where Congress did wish to exclude a relationship from regulation under the Civil Rights Act of 1964, it did so by express statutory provision. See Andrus v. Glover Construction Co., 466 U.S. 608, 616-17 (1980) ("[w]here Congress explicity enumerates certain exemptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent.). Title VII excludes certain employment decisions in order to

protect certain associational interests similar to those asserted by Respondent in this case,[19] as well as protecting a number of similiar concerns.[20] Both Title II of the Civil Rights Act of 1964[21] and Title VIII[22] also include statutory

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19/ See 42 U.S.C. §2000e(b)(2) (exempting bona fide private membership clubs); 42 U.S.C. §2000e(b) (excluding employers with fewer than minimum number of employees -- this requirement was adopted at least in part to protect associational concerns of small employers. See Cong. Rec. 13088 (1964) (Statements of Senator Humphrey)).

20/ See 42 U.S.C. §2000e-1 and 42 U.S.C. §2000-2(e)(2)(exempting religious groups and religious educational institutions respectively); see also 42 U.S.C. §2000-2(i) (permitting preferential treatment in hiring of American Indians by employers on or near Indian reservations); cf. 42 U.S.C. §2000e-2(h) (protecting seniority rights established prior to time of enactment).

21/ See 42 U.S.C. §2000a(e) (exempting private clubs from Public Accomodations Act); 42 U.S.C. §2000a(b)(1) (exempting establishment with no more than five rooms to rent where proprietor is an occupant).

22/ See 42 U.S.C. §3603(b)(2) (exclusion for residential units occupied by no more than four families where owner maintains residence within); 42 U.S.C. §3607 (exemption for private membership organization renting rooms to own members).

exemptions designed to protect associational interests.

II. RACIAL DISCRIMINATION WITHIN LAW PARTNERSHIPS REMAINS A SIGNIFICANT BARRIER TO EQUAL EMPLOYMENT OPPORTUNITY

A. The Racially Premised Decision Making That Persists In Most Law Partnerships Is Precisely the Type of Barrier Title VII Was Intended to Eliminate

For the purpose of this appeal, it must be assumed that Petitioner can demonstrate that overt and deliberate discrimination motivated Respondent's decision to deny Petitioner partnership and to terminate her employment.[23/] Thus, if the decisions

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23/ In dismissing Petitioner's complaint on its face under F.R. Civ. P. 12(b)(1), the District Court was obligated to accept Petitioner's claims of sex discrimination as true. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). The complaint alleged, inter alia, that Respondent knowingly applied different standards to males than to females in making partnership promotions. Complaint ¶17. Indeed, the trial judge expressly stated that his decision to dismiss assumed that even if "naked discrimination was the sole and producing cause of plaintiff's rejection as a partner," the court lacked jurisdiction under Title VII to proceed. 25 Empl. Prac. Dec. (CCH) ¶31, 703 at 20,064 (N.D. Ga. 1980).

below are affirmed, Title VII will present no obstacle to a partnership that wishes to maintain an outright policy of refusing to consider any minority for partnership promotion. By adopting a partnership structure law firms will be able to return to the type of discrimination that flourished prior to 1964. See ante at 6-26.

It is generally recognized that "more subtle" and "indirect forms of racism" exist in most law firms today. M. Goldman, supra, note 4, at 3. Two such barriers, based on invidious racial sterotypes reflecting the perceived prejudices of clients and co-workers, are widespread and operate to deny black lawyers access to partnership positions. Both reflect a form of insitutionalized racism that Title VII was intended to eliminate from the workplace.

The most frequently offered "behind-the-scenes" explanation for the continued exclusion of blacks from law partnerships is that firms fear that clients would prefer

not to have frequent contact with, or depend upon, black attorneys. National Law Journal, April 20, 1981, at 10 (quoting Robert Kutak of Kutak, Rock & Huie, the only major firm with more than two black partners); M. Goldman, supra note 4, at 6, Shuman, supra p. 21, at 260; see also E. Smigel, The Wall Street Lawyer 66 (1964); The Harvard Law Record, supra p. 23, at 13.

That Title VII proscribes employment discrimination stemming from the perceived racial prejudices of clients or customers has been so clear that this principle has seldom merited explicit discussion in the context of a race discrimination case. In the area of sex discrimination, where employers have occasionally attempted to openly justify employment practices on the basis of customer preferences, it has been declared "totally anomalous ... to allow the preferences and prejudices of customers to determine whether ... discrimination was valid." Diaz v. Pan American World Airways,

442 F.2d 385, 389 (5th Cir.), cert denied 404 U.S. 950 (1971)(leading case); see also 29 C.F.R. §1604.2(a)(1)(iii)(except in very limited and specific situations, bfoq may not be granted "because of preferences of coworkers, the employers, clients or customers"). Since Diaz, supra, it has been axiomatic that employers may not discriminate on the basis of client's preferences and the elimination of employment practices that cater to such prejudices has been a primary target of Title VII.

A second excuse offered for the exclusion of blacks from partnership ranks is the fear that a minority lawyer will not "fit in" socially with an otherwise all white partnership. See Shuman, supra, p. 21, at 235, 260; Edwards, A New Role for the Black Law Graduate -- A Reality or an Illusion? 69 Mich. L. Rev. 1407, 1411 (1971); see also Smigel, supra p. 33, at 66. This purported justification is no more than a remnant of the racial animus and openly-enforced

segregation that existed prior to 1964. It reflects the continued prejudicial inability of many whites in upper level positions to view blacks as equals.24/

Title VII was intended to eliminate decision-making based on such "'stereotyped' characterizations," Dothard v. Rawlinson, 433 U.S. 321 333 (1977), "[i]t provides that men and women shall be employed on the basis of their qualifications, ... not as colored citizens, but as citizens of the United

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24/ The principle that discriminatory employment practices cannot be justified by co-workers' racial prejudice is also so well accepted that it is seldom explicitly raised. Title VII has, however, been frequently used to invalidate employment policies that reflect and reinforce social prejudice among employees. See, e.g., United States v. Jacksonville Terminal Co., 451 F.2d 418, 458 (5th Cir. 1971)(employer and union ordered to institute nonracial rules regarding use of toilet, locker and shower facilities; segregated facilities seen as "a vestige of pervasive discrimination"); Dickerson v. U.S. Steel Corp., 15 Fair Empl. Prac. 752, 772 (E.D.Pa. 1977) ("[t]he decision of an interviewer not to send blacks to a certain department in order to avoid complaints on harrassment is as much a racially based decision as is a foreman's decision to reject blacks because he does not want to work with them").

States." 110 Cong. Rec. 13088 (1964)(statement of Senator Humphrey) quoted in International Brotherhood of Teamsters v. United States, 431 U.S. at 335 n.15. A decision to reject a black partnership candidate and to terminate her employment, based solely on a suspicion that a minority lawyer would not "fit in", is racially premised and violates the fundamental mandate of the Civil Rights Act of 1964 not to treat individuals as simply components of a racial class." City of Los Angeles Department of Water v. Manhart, 435 U.S. 702, 708 (1978); see also Connecticut v. Teal, ___ U.S. ___, 50 U.S.L.W. 4716 (June 4, 1982).

Law partnerships should not be given special privlieges to engage in racial discrimination based on a fear of client or collegue discomfort. Nor should the federal courts abdicate their responsibility to eliminate these forms of racial discrimination simply because partnership decisions necessarily entail subjective judgements.

The trial court's decision below relied heavily on the misperception that recognition of Title VII jurisdiction would undermine law firms' freedom to select partners based on a subjective evaluation of a wide range of "needed, worthy and desirable qualities." 25 Empl. Prac. Dec. 31, 703 at ¶20, 062 (analogizing partnership promotions to marriage). Title VII has been applied to a wide range of subjective decision-making processes, including those involving employment of lawyers and other professionals. See, e.g., Kohn v. Royall, Koegel & Wells, 59 F.R.D. 515 (S.D.N.Y. 1973), appeal dismissed 496 F.2d 1094 (2d Cir. 1974)(hiring of law firm associates); Anderson v. City of Albequerque, 690 F.2d 796, 802 (10th Cir. 1982)(female attorney alleges unlawful discrimination in hiring for position of director of city's Human Rights Board, "subjective evaluations" at issue); see also Bartholet, Application of Title VII to Jobs in High Places, 95 Harv. L. Rev. 947,

973-978 (1982). In cases involving this type of subjective system, the courts have warned that subjectivity may serve to mask discrimination, and therefore the courts must exercise special scrutiny. Davis v. Califano, 613 F.2d 957 D.C. Cir. 1979). Title VII jurisdiction has been exercised to fulfill the statutory mandate to ensure that such decisons are not tainted by unlawful discrimination, while not necessarily disturbing the subjective process. Id.

Thus, the trial court's apparent misapprehension that Title VII would restrict a firm's consideration of a prospective partner's "ability and industry, ... moral character, fidelity, trustworthiness, loyalty, personality and love," 25 Empl. Prac. Dec. 31, 703 at ¶20, 062, is totally unfounded. Law firms would continue to be free to evaluate these qualities and to reject candidates, minority or otherwise, who fell short of the firm's standards. The application of Title VII would merely pro-

hibit the addition -- either overtly or covertly -- of "white," "male," "protestant," or any other discriminatory criteria to the list of characteristics required for partnership.25/

The reluctance of the courts below to become involved in reviewing this type of subjective selection system and the court's confusion regarding the effect of Title VII on such systems are not unprecedented. In the years immediately following the 1972

25/ While this task will undoubtedly involve the courts in "sensitive and difficult" factual inquiries, U.S. Postal Service v. Aikens, 51 U.S.L.W. 4354, 4356 (April 5, 1983), regarding the state of mind of persons who make partnership decisions, the Court has recently affirmed that this difficulty does not justify a departure from the general judicial function of attempting to determine such ultimate questions of fact.

In addition, it should be noted that under well-established Title VII doctrine, plaintiffs should be permitted to challenge facially neutral standards used in the partnership promotion process. Such standards, would however, be unlawful only where they were unrelated to the wide range of qualities that can be legitimately desired

amendments that extended Title VII to cover academic institutions, several courts openly expressed their hesitance to review faculty appointments at the university level. See, e.g., Faro v. New York University, 502 F.2d 1229 (2d Cir. 1974) (plaintiff's Title VII claim "would remove any subjective judgments by her faculty collegues in the decision-making process"). This "hands off" approach has since been soundly rejected and recognized as a "judicial abdication of a responsibility entrusted to the courts by Congress." Sweeney v. Board of Trustees of Keene State College, 569 F.2d 169, 176 (1st Cir.), vacated and remanded on other grounds, 439 U.S. 24 (1978)(remand expressly sanctioning application of traditional Title VII standards to universities); Powell v. Syracuse University, 580 F.2d 1150 (2d Cir.), cert. denied, 439 U.S. 984 (1978) (retracting Faro, supra.[26/] Similarly,

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26/ See also Jepsen v. Florida Bd. of Regents, 610 F.2d 1379, 1383 (5th Cir.

this Court should reject the "hands off" approach articulated by the opinions below and encourage the courts to undertake their statutory responsibility to eradicate racially premised practices in law firms.

B. As A Result of Continued Racial Discrimination, Blacks Remain Dramatically Underrepresented in the Legal Profession and in Law Partnerships.

The vestiges of the legal profession's racist history and the effects of ongoing racial discrimination are apparent in the continued underrepresentation of blacks in the profession. Although minorities have made substantial gains during the past decade in their particpation rate within the profession, the practice of law remains one of the most segregated of all occupations.

That the legal profession has remained

26/ continued
1980); Kunda v. Muhlenberg College, 621 F.2d 532, 551 (3d Cir. 1980); Davis v. Weidner, 596 F.2d 726, 731 (7th Cir. 1979).

one of the most racially exclusionary and segregated occupational groups in this country is an inescapable fact. In 1972, for instance, of the seventy-nine occupations for which statistics are available, the category of "lawyers and judges" ranked seventy-ninth as employing the fewest black men -- as a percent of all men in the profession -- of any occupation.[27/]. Further, while the ratio of the total population to all lawyers in 1980 was 420 to 1, the ratio for blacks was 2000 to 1. B. Curran, Career Patterns of Minority Lawyers 3, (paper presented at a program on "The Need for Recruitment of Minority Lawyers" at the ABA midyear meetings, Feb. 5, 1983 (prepared by the American Bar Foundation)).

Still another major impediment is the fact that black lawyers continue to be denied access to the most lucrative areas of

27/ Westcott, Blacks in the 1970's: Did they scale the job ladder, 105 Bureau of Labor Statistics Monthly Labor Review 32 (June 1982).

practice. According to a 1979 estimate by J. Clay Smith, Jr., then Acting Chariman of the Equal Employment Opportunity Commission, only 13.6% of black lawyers were employed in private practice.[28/] This figure stands in sharp contrast to the 70% of the total lawyer population in private practice.[29/] The majority of black lawyers are forced to accept employment in less desirable positions with governmental agencies and corporations. G. Segal, supra note 2, at 216. Smith attributed the disproportionately small number of black lawyers in private practice at least in part, to the failure of established white firms to hire blacks in

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28/ See G. Segal, supra note 2, at 215-16 (citing J. Clay Smith, Jr., "The Future of the Black Lawyer in America," speech before the Annual Convention of the Old Dominion Bar Association, May 26, 1979, p. 2). The remainder of black lawyers is divided as follows: public interest law firms (4.5%); corporations (20.9%); federal or state government lawyers (31.8%); federal or state judges (3.6%); law teachers (2.7%); nonlegal jobs or unemployed (22.7%).

29/ B. Curran, Lawyer Demographics 4, paper presented at ABA Annual Meeting, Aug. 8, 1981.

substantial numbers. Id.

In 1971, Judge Harry T. Edwards, then a professor at the University of Michigan Law School, conducted a study of seventy-one law firms in seven midwestern states. A New Role for the Black Graduate -- A Reality or an Illusion? 69 Mich. L. Rev. 1407 (1971). The study revealed that while blacks comprised 8.1% of the population and 2.0% of the lawyers in the relevant states, they accounted for fewer than 0.6% of the total number of lawyers working at the responding firms (13 of 2,225), and only 0.8% of the partners (1 of 1,249). Id. at pp. 1434, 1438. Judge Edwards concluded that the major barrier to providing black lawyers with opportunities for "quality" practices was the "lack of interest on the part of firms to employ beyond a 'token' minimum of Blacks." Id. at 1428.[30] See also M.

30/ Edwards, "Headwinds" Minority Placement in the Legal Profession, 16 L. Quadrangle Notes 15, 17 (U. of Mich. L.S., Spring (1972)).

Goldman, supra note 4, at 6-7 (American Bar Foundation study reports that although a few Chicago firms in 1972 were willing to consider "a few highly qualified blacks" to work as "research attorneys" or in "low-status areas of the law," black law graduates were still severely limited by the "persistence of formal and informal policies of segregation within most white law firms.")

Current studies confirm that although minorities have made progress in the past decade in attaining associate positions with firms, very few black lawyers have been promoted to the rank of partner. Thus, the progress that has been made will not have lasting effect unless the growing number of black associates is guaranteed an opportunity to continue their careers free from racially motivated employment decisions.

A study recently published by Geraldine Segal reports the 1980 racial composition of 325 law firms in sixteen cities. G. Segal,

Blacks in the Law (1983). This study includes data from 218 "medium size" firms, each employing twenty-five to ninety lawyers, and 107 large firms, each with more than ninety attorneys. These firms accounted for over 28,000 lawyers. From this extensive study, Ms. Segal concludes "that blacks in this country have not acquired their fair share of the opportunities and rewards potentially available from the pursuit of law." Id. at 243.

A tabulation of the data gathered by Segal's study is contained in the attached Appendix. A brief summary of the figures for several cities suffices to demonstrate that blacks continue to be severely underrepresented in the legal progression, and that black lawyers in many metropolitan bars are grossly underrepresented in law partnerships.

	Atlanta	Chicago	San Francisco
% Blacks In City	65.7	34.7	11.3
% Black Lawyers In SMSA	5.02	3.25	3.43
% Black Lawyers In Firms	1.8	1.1	1.1
% Black Partners In Firms	.02	.02	.01

A 1982 survey of 151 of the nation's largest 200 law firms confirmed Segal's finding regarding the unwillingness of most law firms to promote minorities to partnership positions. National Law Journal, Dec. 20, 1982, at 1, 8, 10. Despite a significant increase in the number of minority associates hired by these firms over the past decade, less than 30% of the firms surveyed employed a black partner. Id. Blacks accounted for only 54 of the total 9,210 partners (0.59%) of the 151

An even more recent pronouncement on the failure of law firms to provide minorities with equal employment opportunities came at this year's American Bar Association midyear meeting. In a program co-sponsored by the ABA Section on Legal Education and the National Association for Law Placement (NALP), officials form both of these organizations along with law students and law firm hiring partners expressed deep concern over the continued practice of many law firms to discriminate on the basis of race. See Minority Attorneys Struggle to Land that First Job, Legal Times, Feb. 7, 1983, at 32, 31. The results of a NALP presented at this program were plain: "minorities remained dramatically underrepresented in private law firms." Id. at 32.

C. A Failure to Permit Title VII Scrutiny of Partnership Promotion Decisions Will Have Far-Reaching Effects and Inhibit Integration of the Entire Legal Profession.

This case involves a narrowly drawn

question of law related solely to Title VII of the Civil Rights Act of 1964 and its coverage. No issues are raised related to the "separate, distinct, and independent remedies provided under 42 U.S.C. §1981 or similar statutes. Johnson v. Railway Express Agency, 421 U.S. 454, 461 (1975); see B. Schlei and P. Grossman, Employment Discrimination Law, 635-39 (1976).[31/] Nevertheless, amicus believes that the resolution of the issue presented here is of tremendous importance to racial minorities and to the future of the legal profession.

Today, the partnership promotion promotion process within law firms is the most firmly entrenched racial barrier in a long history of barriers that have denied blacks equal access to the legal profession. The

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31/ Additionally, because the courts below dismissed the Petitioner's complaint prior to the introduction of evidence, this case does not present many of the more subtle substantive issues that might properly present themselves in later actions if the judgement here is reversed.

sanctioning of such a discriminatory barrier by this Court would be perceived by minorities as a clear message that black lawyers, as a group, will remain exiled at the "fringe of the profession." Gellhorn, supra note 3, at 1070. A closing off of the "top of the ladder" would create "frustration, dissatisfaction, and disillusionment," Edwards, supra p. 34, at 1431, and have both direct and indirect effects on the employment opportunities available to minorities.

In 1980 there were over 1100 law firms that employed twenty or more lawyers, and this number was expected to increase. B. Curran, Lawyers Demographics, supra note 29, at 11. Most of these firms are located in metropolitan areas, where the majority of minority lawyers seek employment. Id. at 10 (48% of the private practitioners in the District of Columbia are employed in firms of ten or more lawyers). Thus, in the most direct and limited sense, if the judgement in this case becomes the law of the land,

tens of thousands of jobs in the legal profession will be cordoned off as an area of authorized discrimination. Added to this could be hundreds of thousands of partnership positions in other professions that are, or could be, organized as partnerships.

Moreover, the failure to provide some legal assurance that a black associate will not be denied partnership and discharged for racially motivated reasons will undoubtedly limit the number of blacks willing to accept positions with firms. Despite the trial court's chimerical prognosis that a qualified associate who is denied partnership remains "just as much a promising young lawyer" who "will simply have to seek stardom elsewhere," 25 Empl. Prac. Dec. 31,703 at 20,064, it is unlikely that many blacks will wish to spend a significant portion of their careers working for firms, and for a firm's clients, at the risk of being moved "up and out" by racially motivated and premised decisions. Partner-

ship positions, with their security, responsibility and renumeration remain the "strongest reward" attracting and motivating law firm associates. E. Smigel, supra p. 33, at 259; see also Nelson, Practice and Privilege: Social Change and the Structure of Large Law Firms, 1981 Amer. Bar Fnd. Research J. 97. If these positions can be distributed according to racial prejudice or sterotyped characterizations, the desire of black lawyers to spend five or more years as an associate will be greatly diminished.

Finally, because of the position of law firm partners at the perceived apex of the stratified legal profession, see Goldman note 9, at 3-5, the message conveyed by an affirmance of the judgement below would dissuade many blacks from entering the profession at all. See Brown, Racial Discrimination in the Legal Profession, 53 Judicature 385, 386 (1970)("[l]aw firms must also realize that their disinterest in hiring black lawyers discourages potential

black college graduates from ever enrolling in law school"), see also G. Myrdal, supra note 1, at 550 (discriminatory treatment results in socialized perception, within minority group, that minorities are incompetent and unable to function in lawyer's role).

The necessity of keeping upper level positions open finds support in the legislative history of Title VII. In 1972, Congress specifically considered and rejected a proposal to exempt physicians and surgeons from Title VII coverage. Speaking in opposition to the exemption, Senator Javits said:

> One of the things that those discriminated against have resented the most is that they are relegated to the position of the sawers of wood and the drawers of water; ... they cannot ascend the higher rungs in professional and other life.
>
> Yet, this amendment would ... reinstate the possibility of discrimination on grounds of ethnic origin, color, sex, religion ... [for] one of the rungs of the ladder ... and thus lock in and fortify the idea that being a doctor or a surgeon is just too good

> for members of a minority. 18 Cong. Rec. 3802 (1972).

The desire to open upper level positions to encourage minority advancement at all levels was also a motivation behind the 1972 extension of Title VII to cover academic institutions,[32] and government employment.[33] Bartholet, supra p. 37, at 980-83.

This Court has repeatedly observed that "in enacting Title VII of the Civil Rights Act of 1964, Congress intended to prohibit all practices in whatever form which create inequality of employment opportunity due to discrimination on the basis of race, religion, sex, or national origin [citations omitted], and that its policy of outlawing

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32/ See, e.g., S. Rep. No. 415, 92d Cong., 1st Sess. 12 (1971) (minorities must be ensured equal opportunity to "the higher-paying and more prestigious positions in the institutions of higher learning").

33/ Id. at 14 (criticizing "inordinate concentrations of minorities and women in the lower [civil service] grade levels, and their conspicuous absence from the higher grades") See, e.g., H. Rep. No. 238, 92d Cong., 1st Sess. 23-24 (1971).

such discrimination should have the 'highest priority.'" Franks v. Bowman Transport Co., 424 U.S. 747, 763 (1976)(citations omitted).

CONCLUSION

The courts below failed to appreciate the substantial effect that the judgement here would have on employment practices throughout the bar. To accomplish the purposes of Title VII, this Court should reverse the judgement of the Eleventh Circuit.

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Dated: May 9, 1983

APPENDIX

APPENDIX

City/Type of Firm	Law Firms[1] Total Lawyers	Black Lawyers	Total Partners	Black Partners	Total Associates	Black Associates	City % Black Lawyers in SMSA[2]	% Blacks in City Population[3]
Atlanta							5.02%	65.7%
Large Firms	432	4(0.9%)	212	1(0%)	220	4(1.8%)		
Medium Firms	620	15(2.4%)	278	1(0.4%)	342	14(4.1%)		
All Firms	1052	19(1.8%)	490	1(0.2%)	562	18(3.2%)		
Boston							2.07%	21.1%
Large Firms	368	4(1.1%)	182	1(0.5%)	186	3(1.6%)		
Medium Firms	1015	9(0.9%)	524	1(0.2%)	491	8(1.6%)		
All Firms	1383	13(0.9%)	706	2(0.3%)	677	11(1.6%)		
Chicago							3.25%	34.7%
Large Firms	1691	22(1.3%)	812	2(0.2%)	879	20(2.2%)		
Medium Firms	2050	19(0.9%)	1000	1(0.1%)	1050	18(1.7%)		
All Firms	3741	41(1.1%)	1812	3(0.2%)	1929	38(2.0%)		
Cleveland							4.97%	42.5%
Large Firms	536	8(1.5%)	246	2(0.8%)	290	6(2.1%)		
Medium Firms	584	12(2.1%)	268	2(0.7%)	316	10(3.2%)		
All Firms	1120	20(1.8%)	514	4(0.8%)	606	16(2.6%)		
Columbus							3.73%	21.9%
Large Firms	223	5(2.2%)	111	0(0%)	112	5(4.5%)		
Medium Firms	42	1(2.4%)	24	0(0%)	18	1(5.6%)		
All Firms	265	6(2.3%)	135	0(0%)	130	6(4.6%)		
Detroit							5.42%	61.6%
Large Firms	212	8(3.8%)	103	0(0%)	109	8(7.3%)		
Medium Firms	368	10(2.7%)	206	2(1.0%)	162	8(5.0%)		
All Firms	580	18(3.1%)	309	2(0.6%)	271	16(5.9%)		
Houston							3.27%	25.9%
Large Firms	1045	10(1.0%)	424	0(0%)	621	10(1.6%)		
Medium Firms	729	7(1.0%)	301	0(0%)	428	7(1.6%)		
All Firms	1774	17(1.0%)	725	0(0%)	1049	17(1.6%)		
Los Angeles							3.38%	13.4%
Large Firms	716	16(2.0%)	250	2(0.8%)	466	14(3.0%)		
Medium Firms	1444	26(1.8%)	682	5(0.7%)	762	21(2.8%)		
All Firms	2160	42(1.9%)	932	7(0.7%)	1228	35(2.9%)		

1/ G. Segal, supra note 1, at pp. 125, 131, 137, 144, 149, 154, 159, 165, 168, 170, 180, 185, 190, 194, 205 (1983)

2/ Census of Population: Equal Employment Opportunity Special File [machine readable data file]/prepared by Bureau of Census, Washington: The Bureau. 1982.

3/ G. Segal, supra note 1, at 118.

City/Type of Firm	Law Firms[1] Total Lawyers	Black Lawyers	Total Partners	Black Partners	Total Associates	Black Associates	City % Black Lawyers in SMSA[2]	% Blacks in City Populatio
Milwaukee							1.45%	22.9%
Large Firms	277	4(1.4%)	153	1(0.7%)	124	3(2.4%)		
Medium Firms	116	0(0%)	60	0(0%)	56	0(0%)		
All Firms	393	4(1.0%)	213	1(0.5%)	180	3(1.7%)		
Minneapolis							1.04%	7.6%
Large Firms	272	2(0.7%)	145	0(0%)	127	2(1.6%)		
Medium Firms	184	0(0%)	101	0(0%)	83	0(0%)		
All Firms	456	2(0.4%)	246	0(0%)	210	2(0.9%)		
New York							2.59%	21.0%
Large Firms	3831	56(1.5%)	1267	1(0.1%)	2564	55(2.1%)		
Medium Firms	4280	40(0.9%)	1565	3(0.2%)	2715	37(1.4%)		
All Firms	8111	96(1.2%)	2832	4(0.1%)	5279	92(1.7%)		
Pittsburgh							2.63%	24.0%
Large Firms	497	3(0.6%)	236	1(0.4%)	261	2(0.8%)		
Medium Firms	145	0(0%)	62	0(0%)	83	0(0%)		
All Firms	642	3(0.5%)	298	1(0.3%)	344	2(0.6%)		
Philadelphia							3.67%	36.5%
Large Firms	1094	26(2.4%)	531	4(0.8%)	563	22(3.9%)		
Medium Firms	550	6(1.0%)	228	1(0.3%)	262	5(1.9%)		
All Firms	1644	32(1.9%)	759	5(0.7%)	825	27(3.3%)		
Richmond							4.28%	50.7%
Large Firms	276	3(1.1%)	134	0(0%)	142	3(2.1%)		
Medium Firms	177	1(0.6%)	96	0(0%)	81	1(1.2%)		
All Firms	453	4(0.9%)	230	0(0%)	223	4(1.8%)		
San Francisco							3.43%	11.3%
Large Firms	927	14(1.5%)	397	1(0.2%)	520	13(2.5%)		
Medium Firms	727	5(0.6%)	312	0(0%)	415	5(1.2%)		
All Firms	1654	58(2.1%)	709	1(0.1%)	935	18(1.9%)		
Washington, D.C.							6.57%	68.4%
Large Firms	861	22(2.5%)	352	4(1.1%)	509	18(3.5%)		
Medium Firms	1867	36(1.9%)	877	7(0.8%)	990	29(2.9%)		
All Firms	2728	58(2.1%)	1229	11(0.9%)	1499	47(3.1%)		
TOTALS								
Large Firms	13258	207(1.6%)	5555	19(0.3%)	7693	188(2.4%)		
Medium Firms	14898	187(1.3%)	6584	23(0.3%)	8254	164(2.0%)		
All Firms	28156	394(1.4%)	12139	42(0.3%)	15947	352(2.3%)		

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JUN 10 1983

NO. 82-940

IN THE SUPREME COURT
OF THE UNITED STATES

October Term 1982

ELIZABETH ANDERSON HISHON,

Petitioner,

v.

KING & SPALDING, A PARTNERSHIP,

Respondent,

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MOTION OF NEW ENGLAND LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE, AND BRIEF OF AMICUS CURIAE, NEW ENGLAND LEGAL FOUNDATION, IN SUPPORT OF RESPONDENT.

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ISSUE PRESENTED FOR REVIEW

Does Title VII of the Civil Rights Act of 1964 apply to invitations to join a voluntary association of lawyers for the purpose of practicing law as a partnership?

MOTION OF NEW ENGLAND LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

Pursuant to Rule 36.1 of the Rules of the Supreme Court, the New England Legal Foundation moves this Court for leave to file a brief amicus curiae, bound with this motion, in support of respondents.

New England Legal Foundation (NELF) is a non-profit, public interest law foundation, organized and existing under the laws of the Commonwealth of Massachusetts for the purpose of engaging in litigation on matters affecting the economic interests of the people and businesses of New England. The Foundation has consistently supported the proposition that a proper balance between the rights and interests of employers and employees is essential to the operation of our free enterprise system.

To this end the Foundation has previously participated as an amicus party before this Court in National Labor Relations Board v. Transportation Management Corporation,

No. 82-168, in support of the proposition that the burden to be placed on an employer in a proceeding pursuant to Section 8(a)(3) of the National Labor Relations Act is that of producing credible evidence to rebut or neutralize a prima facie case of discrimination, and not that of overcoming the prima facie case. The Foundation has also filed as an amicus in Kevin H. White v. Massachusetts Council of Construction Employers, ___ U.S. ___, 51 U.S.L.W. 4211 (February 28, 1983), and United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden, No. 81-2110, arguing that the imposition of residency-based hiring quotas infringes the equality of economic opportunity guaranteed under the Privileges and Immunities Clause of the Constitution.

The Foundation supports the rights of employees to enjoy the terms, conditions and privileges of employment free from discrimination, but refutes the contention that the employment

protection guaranteed in Title VII of the Civil Rights Act of 1964 was intended by Congress to apply to decisions pertaining to the ownership of a business. The Foundation, therefore, agrees with the Eleventh Circuit that Title VII does not apply to the decision by the partners of a law firm to refuse to offer an associate an invitation to join the partnership.

The Foundation's public interest perspective will provide this Court with a point of view which might not otherwise be presented in the instant case.

For the foregoing reasons, New England Legal Foundation respectfully requests that this

Court grant leave to file the acompanying brief amicus curiae in support of the Respondent.

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BRIEF OF AMICUS CURIAE, NEW ENGLAND LEGAL FOUNDATION, IN SUPPORT OF RESPONDENT

ISSUE PRESENTED FOR REVIEW

Does Title VII of the Civil Rights Act of 1964 apply to invitations to join a voluntary association of lawyers for the purpose of practicing law as a partnership?

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STATEMENT OF INTEREST

This brief amicus curiae is filed contingent on the allowance of the foregoing Motion for Leave to File said brief. The interest of the amicus curiae in this case is set forth in that Motion.

STATEMENT OF THE CASE

In 1972, the Petitioner, Ms. Hishon, accepted a position as an associate with King & Spalding, an Atlanta law firm with approximately fifty partners and fifty associates. At the time Ms. Hishon became associated with the firm, consideration for partnership occurred at the end of an associate's sixth year and the firm maintained an "up or out" policy. In 1978 the partnership considered extending partnership offers to Ms. Hishon as well as to the other associates hired in 1972. The partnership declined to extend the invitation to Ms. Hishon and to two male associates. Ms. Hishon left the firm in 1979.

Prior to her departure from the firm, Ms. Hishon filed a sex discrimination claim with the Equal Employment Opportunity Commission. The Commission issued a Notice of Right to Sue, and Ms. Hishon filed her complaint in District Court within the statutory 90-day period. The only count

of the complaint considered by the District Court alleged sex discrimination in the firm's decision not to make Ms. Hishon a partner. The District Court dismissed the complaint on the grounds that Title VII of the Civil Rights Act of 1964 is inapplicable to partnership decisions. In an opinion reported at 678 F. 2d 1022 (June 17, 1982), the Court of Appeals for the Eleventh Circuit upheld the District Court. Motions for Rehearing and Rehearing En Banc were denied on September 9, 1982. A Petition for a Writ of Certiorari was granted by this Court on January 24, 1983.

SUMMARY OF ARGUMENT

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2 prohibits an employer from discriminating against an employee with respect to compensation, terms, conditions, or privileges of employment, because of race, color, religion, sex or national origin. Petitioner alleges that these provisions apply to a law partnership when deciding whether to offer a share in the ownership of the business to an associate in the firm.

Petitioner contends that the partners of a law firm are equivalent to employees of a corporation and therefore partnership decisions are analogous to promotions. This argument ignores the fundamental attributes of a partnership, a form of business entity in which the partners voluntarily associate in a business venture, and individually assume their share of the risks and profits of the enterprise. Even though a partnership may have an established institutional identity independent of its

individual partners, this does not lead to the conclusion that for purposes of Title VII the partners are employees rather than the owners of the partnership. Neither does the fact that the partners practice law for the firm change their status from owners to employees.

Although Title VII protects an individual from discrimination in employment opportunities, the term "employment opportunities" may not be interpreted to include the private decisions of individuals to voluntarily associate in a business partnership. To do so would ignore the distinctions between the terms and conditions of employment and terms and conditions of ownership of a business.

Furthermore, a termination of employment as a result of the failure to receive a partnership offer is not an unlawful discharge prohibited by Title VII. The "up or out" policy enforced by a law firm is a nonrenewable contract subject to terms negotiated between the firm and an associate.

Once the term of that contract has expired the expectation of the employee concerning continued employment as an associate expires with it. While an associate may, if invited, rejoin the firm in a new role, that is as an owner, the associate has no legally enforceable expectation to continue employment as an employee of the firm.

ARGUMENT

I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 DOES NOT APPLY TO INVITATIONS TO JOIN A VOLUNTARY ASSOCIATION OF LAWYERS FOR THE PURPOSE OF PRACTICING LAW AS A PARTNERSHIP.

Pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2, it is an unlawful employment practice for an employer—

> (1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

Petitioner alleges that these provisions apply to a law partnership when deciding whether to offer a share in the ownership of the business to an associate in the firm. This allegation rests upon the arguments of Ms. Hishon that: (1) the partners at a large law firm are equivalent to employees of a corporation; (2) elevation to partnership is an employment opportunity or a term, condition or privilege of employment protected by Title VII; and (3) termination of employment as a result of failure to make partner falls within the ambit of an unlawful discharge prohibited by Title VII.

A. Title VII Does Not Alter The Legal Distinction Between a Corporation and a Partnership.

In order to establish the employment context for the application of Title VII, Ms. Hishon argues that a partnership is analogous to a corporation. If the partnership possesses a separate and distinct identity similar to that of a corporation, so the argument goes, its partners are more like employees than owners. Consequently, Ms. Hishon contends that Title VII is applicable to partnership decisions, since those decisions relate merely to a promotion to a managerial position in the company, rather than to a determination of participation in the ownership of the firm.

While the lower court acknowledged that large law partnerships possess many attributes common to corporate forms of business, Hishon v. King & Spalding, 678 F. 2d 1022, 1026 (11th Cir. 1982), it is far too simplistic to equate a partnership to a corporation merely because of the size of the firm, the benefits provided employees,

or the existence of a comprehensive management system. In requesting that this Court ignore the legal form of doing business in order to concentrate solely on the business being performed, the Petitioner seeks to negate the very reasons for the existence of the partnership form. As this Court has stated, "A partnership is generally said to be created when persons join together their money, goods, labor, or skill for the purpose of carrying on a trade, profession, or business and when there is community of interest in the profits or losses." Commissioner of Internal Revenue v. Tower, 327 U.S. 280, 286 (1946). Unlike a corporation, an entity which itself receives profits and incurs losses, and whose shareholders are insulated from personal responsibility, in a partnership the partners voluntarily associate in a business venture and individually assume their share of the risks and profits of the enterprise.

Furthermore, in this matter there is no allegation that the partnership of the law firm in question was created or is operating as a pretense or a sham, that is, a partnership in form but not in substance. Unlike the partnership under scrutiny in Commissioner of Internal Revenue, supra, where a business previously transacted in corporate form was dissolved and reconstituted as a partnership even though only one partner contributed capital or labor to the partnership, the Court of Appeals here has already made a factual determination that King & Spalding is a legitimate partnership.

> King & Spalding operates as a partnership. It is comprised of fifty active partners and employs approximately fifty associates along with other support personnel. It has a lengthy partnership agreement with detailed provisions as to profits, losses, withdrawal, dissolution, etc.

Hishon v. King & Spalding, 678 F. 2d at 1028.

Given this factual determination by the court below, the question becomes whether the partners

of a valid partnership may be deemed to be employees, rather than owners, of the partnership for the purposes of Title VII. While this Court has held that partnerships have "an established institutional identity independent of its individual partners," Bellis v. United States, 417 U.S. 85 (1974), the rationale supporting that principle is inapplicable to the issue before this Court. The question in the Bellis case was whether the Fifth Amendment privilege of an individual partner could be invoked to prevent the production of partnership records. In holding that the Fifth Amendment privilege against self-incrimination does not protect against disclosure of the financial books and records of a partnership, the Court identified various factors as determinative in establishing that an organization possesses an independent institutional identity. The Court concluded that this identity is established when a partnership represents a formal institutional arrangement organized for the continued conduct of the firm's

existence, and when the firm maintains a bank account in the partnership name, has stationery using the firm name on the letterhead, and in general holds itself out to third parties as an enterprise with an identity which is independent of the individual partners. Id. at 95-97.

The fact that a partnership may have an identity which is independent of the individual partners does not, however, lead to the conclusion that for purposes of Title VII the partnership is an employer and the partners merely employees of the firm. The status of a partner as an employee or an employer under Title VII is a question of federal law "to be ascertained through consideration of the statutory language of the Act, its legislative history, existing federal case law, and the particular circumstances of the case at hand." Calderon v. Martin County, 639 F. 2d 271, 271-73 (5th Cir. 1981). Unfortunately, neither the statutory language nor the legislative history of Title VII assists in clarifying the issue. Title VII

merely defines an employee as "an individual employed by an employer." 42 U.S.C. §2000e(f) (1976). The legislative history simply indicates that the term "employer" is "intended to have its common dictionary meaning, except as expressly qualified by the Act." 110 Cong. Rec. 7216 (April 8, 1964).

Although this Court has held that part ownership of a business does not preclude the classification of an individual as an employee subject to federal employment legislation, Goldberg v. Whitaker House Cooperative, Inc., 366 U.S. 28 (1961), the few courts which have considered the narrow issue of whether partners are employees or employers of the partnership have either stated explicitly or implied that partners retain their status as employers. As the Eleventh Circuit analyzed the issue:

> It would be unrealistic to assume a person cannot maintain a proprietary interest and simultaneously work in the business. Mutual exclusivity

> neither exists nor is required in a law firm to maintain its desired partnership structure. This lack of exclusivity, however, does not render the term "partner" equivalent to the term "employee" for purposes of title VII.

Hishon, 678 F. 2d at 1027. Similarly, the Seventh Circuit, in determining whether it had subject matter jurisdiction over a Title VII claim against a firm which consisted of four partners and thirteen non-partners, concluded that, "We do not see how partners can be regarded as employees rather than employers who own and manage the operation of the business." Burke v. Friedman, 556 F. 2d 867 (7th Cir. 1977). Likewise, in determining whether attorneys associated with a law firm were employees of that firm, the District Court in Equal Employment Opportunity Commission v. Rinella & Rinella, 401 F. Supp. 175 (N.D. Ill. 1975) stated that "[S]ince the firm is not a partnership, and the associates are not listed as 'of counsel,' it is only reasonable to conclude that they are employed by

the firm." Rinella, 401 F. Supp. at 181. This passage has been interpreted as indicating that if the attorneys were partners in the law firm rather than associates, they would not be treated as employees. Burke, 556 F. 2d at 869, n. 1.

The court below, therefore, based upon the precedent available and its common sense understanding of a business partnership, concluded that it is improper to ignore the form and substance of a commercial enterprise in order to artificially extend the coverage of Title VII by equating partners of a partnership with employees of a corporation. As the court correctly concluded, "[T]he partnership is [Ms. Hishon's] employer; the partners own the partnership; they are not its 'employees' under Title VII." Hishon, 678 F. 2d at 1028.

B. An Offer to Become a Partner of a Law Firm is Not a Promotion or Employment Opportunity Protected Under Title VII.

Once it has been determined that a partner in a law firm is not an employee of that firm for Title VII purposes, Ms. Hishon's argument that an invitation to join the partnership is a mere promotion or employment opportunity must fail. However, as an alternative argument, the Petitioner contended before the Court of Appeals that should the Court decline to equate partners with employees, it must find the "opportunity" for promotion within the statute's purview. Hishon, 678 F. 2d at 1028.

It is undisputed that the phrase "employment opportunity" can include a promotion to a position beyond that of an "employee" covered by Title VII. In an analogous situation under the National Labor Relations Act, an employee, if promoted to a supervisory position, would no longer have been protected by that Act. Yet, as the Second Circuit Court of Appeals stated in upholding the

applicability of the Act, "[T]he Act protected him as long as he held a nonsupervisory position, and it is immaterial that the protection thereby afforded was calculated to enable him to obtain a position in which he would no longer be protected." National Labor Relations Board v. Bell Aircraft Corp., 206 F. 2d 235, 237 (2nd Cir. 1953); accord, Golden State Bottling Co., Inc. v. National Labor Relations Board, 414 U.S. 168 (1973). It is further undisputed that Title VII applies equally to both professional and non-professional employment. Hecht v. Cooperative for American Relief Everywhere, Inc., 351 F. Supp. 305 (S.D. N.Y. 1972).

What is at issue in the instant appeal, however, is not whether Ms. Hishon would be afforded Title VII protection if she were seeking promotion to a professional upper management position. Rather, the issue is whether such protection is afforded by Title VII if she seeks to become an employer with a partial ownership interest in the firm. It is, thus, the fact that an

offer to join a partnership includes an assumption of the benefits and liabilities of ownership which distinguishes this case from the National Labor Relations Act cases and from other Title VII actions.

The Court of Appeals in this context, therefore, correctly analyzed the few reported cases. In Pettway v. American Cast Iron Pipe Co., 494 F. 2d 211 (5th Cir. 1974), rehearing en banc denied, 494 F. 2d 1296 (5th Cir. 1974), for example, the Fifth Circuit held that election to a Board of Operatives was a valuable term, condition, or privilege of employment. As the lower court comments, however, the Pettway case is unique on its facts due to the manufacturing company's organizational structure. Hishon, 678 F. 2d at 1028. The owner of the company had devised a management plan which set up a Board of Management and a Board of Operatives. The Board of Operatives was comprised of elected, nonsupervisory personnel from which blacks were

excluded. Upon the owner's death, all outstanding common stock was bequeathed to the Boards to be held in trust for the employees. Because the Court found election to the Board of Operatives to be a valuable term, condition, or privilege of employment under Title VII, it ordered that the discrimination be ended. Pettway, supra. However, as the Hishon Court pointed out, the employees elected to the Board of Operatives remained employees even while serving on the Board and "never actually 'owned' the company in their individual capacities, but acted 'in trust' for all present and future employees." Hishon, 678 F. 2d at 1029. The Court also emphasized that the complex management structure devised by the owner in itself caused election to the Board to become a valuable term, condition or privilege of employment. Id. Pettway is, therefore, clearly distinguishable from the case at hand, in which the partners at King & Spalding actually own the firm and there are no unique aspects to the firm's

management structure which in and of themselves cause elevation to partnership to become a valuable term, condition, or privilege of employment.

A more problematic decision was reached by the District Court in Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123 (S.D. N.Y. 1977), in which the Court denied a motion to dismiss a Title VII complaint alleging unlawful discharge of an associate on the basis of his national origin and religion. Except for passing remarks that the Court need not decide whether Title VII applies to partners inter se, and that the application of Title VII might be different if the firm were firing a partner or considering a non-associate for partner, the Court neglected to address the ownership aspects of the decision to grant or withhold partnership status. Rather, it misguidedly equated a partnership offer with a progressional promotion. Id. at 128. As has been stated previously, it is a fundamental error to ignore the distinctions

between the terms and conditions of employment and the terms and conditions of ownership. Moreover, the statement in Lucido that the opportunity to become a partner at Cravath was a term, condition or privilege of employment was merely dicta, since the Court had already determined that a claim for relief had been stated under Title VII, and the Hishon Court quite properly and unequivocally rejected that dicta. Hishon, 678 F. 2d at 1029. Rather, in continuing to stress the unique attributes of a partnership, the Court correctly reiterated its refusal to extend the meaning of "employment opportunities" beyond its intended context and thus encroach upon the private decisions of individuals to voluntarily associate in a business partnership. Id. at 1028.

C. **Termination of Employment as a Result of the Failure to Receive a Partnership Offer is Not a Unlawful Discharge Prohibited by Title VII.**

It is undisputed that Title VII prohibits certain discriminations in the firing of an associate

in a law firm which is subject to the Act. However, Ms. Hishon seeks to equate the discriminatory firing of an associate with the termination of an individual, pursuant to a standard, predetermined, and clearly disclosed policy, as a consequence of the decision not to offer an opportunity to participate in the ownership of the enterprise. While superficially appealing, this argument again ignores the fundamental essence of the partnership form, namely, the voluntary association of persons to share in the profits, losses and management of the business. Partners at King & Spalding, while engaging in the practice of law for the firm, are not employees of the firm but are owners of the firm. Termination under the "up or out" policy complained of by the Petitioner — by which discharge is automatically triggered by a decision against the offer of an ownership interest, a decision not subject to Title VII — bears no similarity to a discriminatory termination of an

employee's rightful expectation of continued employment.

The "up or out" policy reflects a management decision that no associate should be employed by the firm for more than six years, in addition to grace periods granted in order to allow associates who have not been invited into the partnership to find new employment. Nothing in this case indicates that this policy has been applied or waived in a discriminatory fashion. Put simply, the respondent's policy may be viewed as a six-year nonrenewable contract of employment between the firm and the associate. Once the six-year term has expired, the expectation of the employee concerning continued employment as an associate expires. It is at this juncture that the individual is considered for an ownership role in the firm, that is, to be offered a partnership under mutually agreeable terms. His employee status is terminated, in fact, regardless of the partnership decision. In accordance with the firm's universally

applied policy, at the close of the six-year term an employee either becomes a co-owner of the firm, or seeks employment elsewhere. As the Hishon Court pointed out,

> [P]rospective associates are apprised not only of their potential for partnership, but also of the consequences to be suffered following an unfavorable decision. Just as she accepted a representation made to her concerning partnership consideration, [Ms. Hishon] likewise assumed the risk that an unfavorable decision would set in motion the termination procedure under the firm's "up or out" policy."

Hishon, 678 F. 2d at 1029.

However, both the dissent of Judge Tjoflat in the instant case and the opinion of Judge Gagliardi in the Lucido case seek to distinguish the partnership decisions pertaining to present associates from partnership invitations to attorneys not associated with the firm. As Judge Tjoflat stated, "[W]hile I agree that Title VII would not apply to the discrete decision whether to

take on a new partner, when the partnership decision inextricably and inevitably is a decision whether to terminate employment, I would hold that Title VII applies." Hishon, 678 F. 2d at 2030. This view ignores the fact that the nature of the decision to make a partnership offer — to join the "voluntary" association — is the same whether the applicant has been or has not been associated with the firm. The offer of partnership is just that, an offer to share in the ownership, and not an offer of employment. Consequently, as an offer of ownership, the invitation is not a term, condition, or privilege of employment or an employment opportunity encompassed by Title VII.

Moreover, a contrary opinion unleashes consequences unwarranted by the language of Title VII. Logically, if a partnership decision is deemed to fall under the auspices of Title VII, all other forms of ownership should be equally regulated. Thus, a closely held corporation in which stockholders are also employees would be required

to hold stock options open to all other employees as a term, condition or opportunity of employment. Likewise, a family owned corporation would violate Title VII by extending ownership only to relatives who happen to be of the same race, religion or national origin. Once a business entity employs more than fifteen employees, the form of that entity would become merely a legal fiction under Title VII. If the coverage of Title VII is to be expanded to this extent, it is the responsibility of Congress and not the Courts to dictate such a change.

CONCLUSION

An offer to share in the ownership of a business is not a term, condition, privilege or opportunity of employment to which Title VII applies. The opinion of the Eleventh Circuit Court of Appeals dismissing Petitioner's suit alleging discrimination by a law firm in refusing to invite

her into a partnership should, therefore, be affirmed.

By its Attorneys,

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In the Supreme Court of the United States

OCTOBER TERM, 1982

ELIZABETH ANDERSON HISHON,

Petitioner,

vs.

KING & SPALDING,

Respondent.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF THE WOMEN'S BAR ASSOCIATIONS OF ILLINOIS AND NEW YORK

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BRIEF AMICUS CURIAE OF THE WOMEN'S BAR ASSOCIATIONS OF ILLINOIS AND NEW YORK

This brief is submitted by the Women's Bar Associations of Illinois and New York (hereinafter Women's Bar Associations) urging that the decision of the Eleventh Circuit be reversed. The issue in this case is whether Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.* protects attorneys employed by law firms from being discharged from their employment or denied admission to the partnership as a result of discrimination on the

basis of their race, color, religion, sex or national origin. Petitioner was discharged from her employment by respondent and was denied membership in the law firm allegedly because of her sex. While this particular employment decision directly affects only these parties, the application of Title VII to the employment of professionals has overriding significance to women, blacks and other minorities. Because of their concern for the structure of the legal profession as a whole and the future of women and other minorities within the profession, the Women's Bar Associations join in filing this brief *amicus curiae* to bring to the attention of this Court the profound social and economic consequences of denying individuals the right to participate fully in the professions on the basis of their individual merit, free from discrimination.

INTEREST OF AMICI

Women's Bar Association of Illinois

The Women's Bar Association of Illinois ("WBAI") was founded in 1914 for the purpose of promoting and fostering the interests and welfare of women attorneys and maintaining the honor and dignity of the legal profession. The WBAI has over 700 members who practice in all areas of the law, and whose ages range from newly admitted attorneys in their twenties to attorneys in their eighties who have been in practice over fifty years.

The first major activity of the WBAI was its campaign to secure for women the right to vote. Since its inception, the WBAI has actively monitored and often become involved in matters affecting women in the legal profession, women and women attorneys. Recently, the WBAI has been active in securing fair divorce legislation, ensuring that battered women have legal representation and has

participated as *amicus* in cases involving the rights of women attorneys. Throughout its history, WBAI members have been mindful that in 1872 Illinois resident Myra Bradwell was denied a license to practice law by the Illinois and United States Supreme Courts, for the sole reason that she was a woman. *Bradwell* v. *State*, 16 Wall. 130 (1872).

The members of the WBAI, through personal experience and observation, believe that sex discrimination is still the major obstacle barring full participation by women attorneys in the legal profession.

Women's Bar Association of the State of New York

The Women's Bar Association of the State of New York ("WBASNY") is a membership organization with ten chapters throughout the state. The WBASNY has been involved in major litigation as a force supporting women's rights and fighting to remove the barriers which prevent women from participating fully in American society. The Association is particularly concerned with the status and advancement of women lawyers in the practice of their profession.

In addition to its efforts in the area of litigation, WBASNY has an ongoing legislative program to analyze bills pertaining to women and legal matters introduced in the New York State legislature. Through the work of its legislative committee and chapters WBASNY has been instrumental in defeating legislation restricting abortion, passing bills providing protection to women in child custody and support cases, providing access to birth control information and promoting other legislative efforts of importance to women.

STATEMENT OF THE CASE

After seven and one half years as an associate at the large Atlanta law firm of King & Spalding, petitioner Elizabeth Hishon was discharged from her employment as the result of the firm's refusal to admit her to partnership and the consequent implementation of its up-or-out policy. Ms. Hishon promptly initiated this lawsuit, under Title VII of the Civil Rights Act, alleging that her termination and the denial of partnership were both the direct result of the firm's discrimination against her on the basis of sex. The complaint offers numerous examples of alleged sex discrimination in work assignments and other terms and conditions of her employment, in addition to the alleged discrimination with respect to the privilege of being considered for partnership.

All of these allegations must be taken as admitted for purposes of this review because the district court dismissed her complaint for lack of jurisdiction under Title VII. In tone and reasoning the district court's opinion reflects an insensitivity to the employment and civil rights issues involved in the case. The court analogizes the professional partnership relationship to the intimacy of marriage and reasons that the tax-exempt private club exception of §2000e(b) should be judicially expanded to protect all law firms—and, by implication, all other professional partnerships in accounting, architecture, advertising and other fields—from any scrutiny for potential unfair and discriminatory employment practices. The court ignored the commercial and profit-oriented nature of these firms and the time and labor invested by associates striving to earn partnership based on their individual merit.

The Eleventh Circuit's majority opinion affirming the dismissal, although more temperate in tone, nevertheless

persisted in evading the key question emphasized in the dissent by Judge Tjoflat: why should the firing of an employed associate be insulated from Title VII scrutiny just because the law firm waited until partnership decision time to effect the termination?

SUMMARY OF ARGUMENT

The Eleventh Circuit's opinion sanctioning sex discrimination by a group of lawyers organized as a partnership is without precedent. The language of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, its legislative history, decisions by other courts and public policy considerations all dictate a contrary ruling.

The statutory language found at §2000e(a) clearly states that partnerships are employers subject to the Act. Section 2000e-2(a) further provides that employees and other individuals have standing to complain about discrimination in the terms, conditions or privileges of their employment or potential employment.

The legislative history of Title VII, in particular the debate surrounding the adoption of the 1972 Amendments, reveals a congressional intent to reach and remove those barriers which have traditionally kept women and minorities out of the professions and other high paying fields. 18 Cong.Rec. 3802, 4817-18.

Other courts that have considered the application of Title VII to partnerships have not hesitated to find that employees of the partnerships are protected by the Act. *Lucido* v. *Cravath, Swaine & Moore*, 425 F.Supp. 123 (S.D. N.Y. 1977); *Blank* v. *Sullivan & Cromwell*, 418 F.Supp. 1 (S.D.N.Y. 1975); *Kohn* v. *Royall, Koegel & Wells*, 59 F.R.D. 515 (S.D.N.Y. 1973) *appeal dismissed*, 496 F.2d 1094 (2d Cir. 1974).

In other cases, courts have looked beyond the designation or "employee" label, and instead have looked to the economic relationship of the parties to determine whether discrimination affected a term, condition or privilege of employment. *Gomez* v. *Alexian Brothers Hospital*, 698 F.2d 1019 (9th Cir. 1983); *Silby Memorial Hospital* v. *Wilson*, 488 F.2d 1338 (D.C. Cir. 1970); *Puntalillo* v. *New Hampshire Racing Commission*, 375 F.Supp. 1089 (D.N.H. 1974); and *Bonilla* v. *Oakland Scavenger Corp.*, ... F.2d ....., 51 U.S.L.W. 2301 (9th Cir. 1982).

The Equal Employment Opportunity Commission filed a brief urging *en banc* review in which it supported Ms. Hishon's postiion. That agency is charged with the administration of Title VII. Its opinion should now be given proper deference. *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 450 U.S. 964 (1981).

The Eleventh Circuit's reliance upon *Burke* v. *Friedman*, 556 F.2d 967 (7th Cir. 1977), to justify an exception for partnerships is erroneous for two reasons. First, Ms. Hishon's status as an employee is not at issue. She was not a partner at the time the discriminatory acts took place. Second, the court mistakenly used an aggregate, rather than an entity, analysis of partnership law. It ignored the fact specific holding in *Burke*, and applied that court's analysis to a large business entity, the antithesis of the small aggregate type of partnership considered by *Burke*.

An affirmance of the appellate court will give the public the impression that lawyers will be specifically shielded from the application of discrimination laws; in reality, the decision affects thousands of individuals working in such diverse areas as architecture, accounting, mortgage banking and advertising. That many of these professions have

traditionally discriminated against women and other minorities is beyond doubt. That these discriminatory practices should flourish with judicial sanction, however, is contrary to clear congressional intent and prior admonitions of this Court.

It has been held in prior decisions that courts should not deprive discrimination victims of their legal remedies unless it was clear that Congress, itself, intended to provide an exemption to the Act. *County of Washington* v. *Gunther*, 452 U.S. 161 (1981). Congress created no such exemption for legal partnerships or any other large business entities. This Court should reverse *Hishon* v. *King & Spalding*, 678 F.2d 1022 (11th Cir. 1982) and remand Ms. Hishon's cause of action to the district court for trial on the merits.

ARGUMENT

I.

STANDARD METHODS OF STATUTORY ANALYSIS, CORRECTLY APPLIED, SUPPORT REVERSAL.

The Eleventh Circuit stated that it based its decision on "consideration of the statutory language of the Act, its legislative history, existing case law, and the particular circumstances of the case at hand," quoting from *Calderon* v. *Martin County*, 639 F.2d 271 (5th Cir. 1981). It is the position of *amici* that a thorough review of these very factors, the statutory language, the legislative history, case law and the facts of this case, supports Ms. Hishon in her assertion that consideration for partner is a condition or privilege of her employment, entitled to the protections offered by Title VII.

A. The Plain Language of the Statute Supports the Application of Title VII to Partnership Decisions.

The Act provides at §2000e-2(a) that:

> It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any *individual* or otherwise to discriminate against any *individual* with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin; (emphasis added)

By using the word individual rather than the specifically defined word "employee," Congress emphasized its intent

to extend the Act's protections beyond the class of persons who are employees. The use of the word individual signals an intention to cover a wider group of people in employment relationships.

Had Congress wished to limit the Act's coverage to applicants for employment and employees only, it could have easily achieved that result by just using those simple words. It did not. Moreover, the only category of individuals who were excluded from the definition of employee are persons elected to public office and their policymaking staff and advisors, §2000e-2(e).

The wording of the statute shows specific congressional intent to include partnerships as employers at §2000e(a). Partnerships *per se* are not within the specific exclusions enumerated in the Act. Only private clubs which qualify for tax exemption, pursuant to §501(c) of the Internal Revenue Code, and the religious institution exception are exempted due to their associational and privacy concerns. No profit making business organizations were granted exclusions, which is evidence of congressional intent not to grant profit making concerns an "associational" or "voluntary joinder" exemption, such as provided King & Spalding by the Eleventh Circuit.

B. The Legislative History Indicates that Congress Intended to Include the Professions in Title VII.

The second established method of statutory construction, examination of legislative history, demonstrates that Congress fully intended Title VII to cover discrimination against women in professional positions. The best insight into the sex discrimination provisions is derived from a review of the record and debate surrounding the 1972 Amendments to Title VII. The House Report statement

of purpose that prefaces the 1972 Amendments, reflects a concern that women were continuing to be relegated to lesser positions despite the enactment of Title VII in 1964. "Women are subject to economic deprivation as a class. Their self-fulfillment and development is frustrated because of their sex. Numerous studies have shown that women are placed in the less challenging, the less responsible and the less remunerative positions on the basis of their sex alone." H.R. Rep. No. 238, 92d Cong., 2d Session, reprinted in 1972, *U.S. Code Cong. and Ad. News* 2140.

This concern was reiterated in debate by Senator Adlai Stevenson III of Illinois. In his remarks, which clearly equated discrimination based on sex with that based on race or religion, Stevenson emphasized the pernicious character of sex discrimination. He traced the search for women's equal rights to the previous century. "Sex discrimination, especially in employment, is not new. But it is widespread and persistent." 18 Cong. Rec. 4817 (1972).

Stevenson articulated the continuing problems of women workers by citing statistics to show that despite a 75% increase of women in the labor force between 1968 and 1974 "women continue to be relegated to the lower paying positions, largely excluded from the higher paying executive positions, and promoted much slower than men in similar positions." *Id.* The Senator's remarks exhibit a concern not only with discrimination within the professions, but also that discrimination had discouraged the entry of women into these professions:

> The litany of discrimination can continue into a consideration of women in professions in this country. Women presently comprise 3.5 percent of our nation's lawyers, 2 percent of our dentists, and 7 percent of our physicians. The comparable figure for lawyers in

> Denmark is 24 percent and for dentists 70 percent. In Great Britain, 16 percent of the doctors are women, and this figure is 20 percent in Germany and 24 percent in Israel. *Id.* at 4818.

Jacob Javits, the Senator from New York, spoke out against the exclusion of any professionals, and against an exclusionary amendment which proposed to exclude physicians employed by hospitals in particular, by stating:

> One of the things that those discriminated against have resented the most is that they are relegated to the position of the sawers of wood and the drawers of water, that only the blue collar jobs and ditch-digging jobs are reserved for them; and that though they built America, and certainly helped build it enormously in the days of its basic construction, they cannot ascend the higher rungs in professional and other life.
>
> * * *
>
> Yet this amendment would go back beyond decades of struggle and of injustice and reinstate the possibility of discrimination on grounds of ethnic origin, color, sex, religion—just confined to physicians or surgeons, one of the highest rungs of the ladder that any member of a minority could attain—and thus lock in and fortify the idea that being a doctor or a surgeon is just too good for members of a minority and that they have to be subject to discrimination in respect of it, and the Federal law will not protect them. *Id.* at 3802.

Further proof that Congress intended the professions to be covered by Title VII, is found in the 1972 Amendments extending coverage to school teachers and university professors, originally exempted from the Act.

The legislative history is lucid. In enacting Title VII and the 1972 Amendments, Congress intended to cover all professions and to protect all females in the professions.

and further, to extend protection to executive positions and promotions.

C. The Eleventh Circuit Decision is at Odds with Emerging Lower Court Trends and Authority.

The majority panel in *Hishon* grudgingly conceded that a discriminatory discharge of an associate by a partnership "may" state a cause of action under Title VII—as it must, since there is no principled basis in the statute or the legislative history for concluding that associates are not employees or that partnerships are not employers. The court then proceeded to create a special exclusion for associates who have worked long enough to be considered for partnership and are terminated pursuant to an up-or-out policy.

The majority decison in *Hishon* is directly contrary to *Lucido* v. *Cravath, Swaine & Moore*, 425 F.Supp. 123 (S.D. N.Y. 1977), in which the court held that consideration for partnership was an incident of the conditions and privileges of being an associate. Title VII protection has been extended to associates in the other reported decisions in which the issue has been considered. *Blank* v. *Sullivan & Cromwell*, 418 F.Supp. 1 (S.D.N.Y. 1975); *Kohn* v. *Royall, Koegel & Wells*, 59 F.R.D. 515 (S.D.N.Y. 1973) *appeal dismissed*, 496 F.2d 1094 (2d Cir. 1974).

In other cases where the employer has denied that the Title VII plaintiff is an employee, courts have refused to become preoccupied with the "employee" label, and instead have looked to the economic relationship of the parties. In *Gomez* v. *Alexian Brothers Hospital*, 698 F.2d 1019 (9th Cir. 1983), the plaintiff, a physician practicing medicine as a professional corporation, was denied a con-

tract to direct the emergency room of the defendant hospital because the corporation had "too many" Hispanic physicians. The court interpreted §2000e-2(a) to provide that an "individual" has standing to maintain a Title VII action where a defendant subject to Title VII interferes with his employment opportunities. The Ninth Circuit specifically found it persuasive that the Act does not use the term employee to define who may bring an action, and therefore injured individuals who do not stand in a direct employer/employee relationship are covered. Other cases have held that a physician or nurse who directly applies for and is denied staff privileges at a hospital has standing to bring a Title VII action, even though the individual patients and *not* the hospitals are the employers, because the acts of the hospital limited the access of the physician or nurse to their employer/patients. *Silby Memorial Hospital* v. *Wilson*, 488 F.2d 1338 (D.C.Cir. 1970); *Pao* v. *Holy Redeemer Hospital*, 547 F.Supp. 484 (E.D.Pa. 1982).

The same result was reached in *Puntalillo* v. *New Hampshire Racing Commission*, 375 F.Supp. 1089 (D.N.H. 1974), where the court found that the Racing Commission's licensing of jockeys controlled the plaintiff's access to employment, and therefore found jurisdiction to apply Title VII. The Ninth Circuit in *Bonilla* v. *Oakland Scavenger Corp.*, ... F.2d ....., 51 U.S.L.W. 2301 (9th Cir. 1982), rejected the assertion made by an employee-owned corporation that its shareholder preference plan for work assignments should be excluded from the purview of Title VII since the Act does not reach the sale of stock. The court held that the shareholder preference plan, which favored those of Italian descent, was a condition of employment as defined by §2000e-2(a).

Thus, the courts have endorsed the rights of individuals to sue under Title VII in a variety of non-employee situa-

tions. Moreover, the cases have interpreted the statutory terms "conditions" and "privileges" of employment quite expansively, in accord with the remedial interest reflected in the legislative history. This is also the approach of the Equal Employment Opportunity Commission ("EEOC"), the reguatory agency charged with responsibility for enforcing Title VII. In the case at bar, the EEOC participated as *amicus* before the Eleventh Circuit in vigorous support of Ms. Hishon.

In questions of statutory construction, the interpretation given the statute by the regulatory agency charged with its administration is entitled to be given great weight. *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 450 U.S. 964 (1981); *U.S.* v. *Moore*, 95 U.S. 760 (1898). It is not necessary for the court to find that the agency's construction is the only reasonable one, or even that it is the result the court would have reached. *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965). Although the Eleventh Circuit chose to disregard the EEOC's interpretation in this case, the Fifth Circuit, its predecessor, has expressly deferred to the EEOC's interpretation of Title VII in other cases. *Weeks* v. *Southern Bell Telephone and Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969).

In its *amicus* brief filed in support of an *en banc* reconsideration of this case before the Eleventh Circuit, the EEOC opposed the majority panel's analysis and conclusions:

> Ms. Hishon was indisputably the firm's employee, protected under Title VII from discrimination in the terms, conditions, or privileges of employment, §703 (a)(1), 42 U.S.C. §2000e 2(a)(1), and the discriminatory deprivation of employment opportunities, §703

(a)(2), 42 U.S.C. §2000e(a)(2). EEOC brief for Plaintiff-Appellant, *Hishon v. King & Spalding*, No. 80-9021 (11th Cir. 1982)

Implicitly, the EEOC recognized that promotion to partner was the most crucial privilege of employment as an associate at King & Spalding. This Court should give due weight to the Equal Employment Opportunity Commission's conclusion that Ms. Hishon was protected by Title VII from discrimination in the conditions or privileges of her employment, including by implication the partnership privilege.

D. The Analysis of Burke v. Friedman Was Misapplied By The Eleventh Circuit.

Against the backdrop of numerous contrary decisions, the Eleventh Circuit sought comfort from *Burke* v. *Friedman*, 556 F.2d 867 (7th Cir. 1977), in rejecting Ms. Hishon's claims. But *Burke* is distinguishable in two crucial grounds. First, the issue was whether someone already a partner in a small business should be counted as an employee for purposes of satisfying the minimum size test of Title VII. In the present case, of course, the minimum size is manifestly satisfied without counting partners as employees. By contrast, the issue here is whether an employee who is *not a partner* is protected by Title VII from discrimination in the conditions and privileges of her *employment*. This is *not* a case of a partner claiming discrimination on the part of his or her other partners as to the terms of their partnership relationship. This Court is not being called upon to determine whether Title VII applies to such suits by partners.

The rationale of *Burke* is inapplicable here for a second reason. In determining that the three partners could not

be counted as employees to bring the partnership within ambit of the court's jurisdiction, the Seventh Circuit applied the common law aggregate theory of partnership to the jurisdictional requirement of §2000e(a). While this application of the aggregate theory of partnership may arguably have been an appropriate framework for analyzing the character of a small partnership, the entity theory, whereby the firm itself is regarded as having its own existence, is more appropriate for determining the rights and obligations of larger partnerships. Professor A. Bromberg, in his treatise *Crane & Bromberg on Partnership*, extensively reviews the aggregate-entity dichotomy and states at page 19:

> A two or three-man firm, informally run by the partners in their own names with little or no help, and with a good deal of casual use of individual assets for firm business (or firm funds for personal affairs) does not look much like an entity in fact. By contrast, no corporation is more entity-like than a large law firm or accounting firm which has been going for generations often under the name of someone long since dead, with dozens or hundreds of partners (of whom only a handful, as managing partners or an executive committee, make major decisions), and perhaps as many offices and more employees. These extremes suggest one reason why no consistent theory has evolved; some partnerships are much more like entities than others.

The facts of the case at bar compel a finding that King & Spalding's position concerning the status of a partner is not at all conducive to the application of the aggregate theory of partnership. That the courts may reach an opposite result in a different legal context and when presented with a fact situation such as *Burke* v. *Friedman*, *supra*, is simply an example of the fact specific basis for the application of the entity or aggregate theories.

II.

PUBLIC POLICY MANDATES PROTECTION OF PROFESSIONALS EMPLOYED BY PARTNERSHIPS.

The Eleventh Circuit's conclusion that partnerships are excluded from Title VII constraints is not merely incorrect, it is contrary to our nation's public policy forbidding discrimination in the workplace. When confronted with cases questioning the scope of Title VII, this Court has specifically admonished courts to "avoid interpretations . . . that deprive victims of discrimination of a remedy, without clear Congressional mandate." *County of Washington* v. *Gunther*, 452 U.S. 161, 178 (1981). The panel majority in *Hishon* ignored this clear instruction and erroneously read exemptions for higher level positions into the Act. *See*, Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 947 (1982).

To bring law partnerships into exempt status the court of appeals relied heavily on the concept of voluntary association. But law firms are not non-profit social clubs; the of appeals relied heavily on the concept of voluntary asso- largest are multimillion dollar commercial enterprises. That profit making purpose of the partnership destroys the analogy between it and the private club. Note, *Applicability of Federal Anti-Discrimination Legislation to the Selection of a Law Partner*, 76 Mich.L.Rev. 282, 311 (1977); *Cornelius* v. *Benevolent Protective Order of Elks*, 382 F. Supp. 1182 (D. Conn. 1974). As this Court has recognized "the real life fact [is] that lawyers earn their livelihood at the bar." *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 368 (1976). As noted in *Bates*, "[w]e all know that law offices are big businesses, that they may have billion dollar or million dollar clients, they're run with computers, and all the rest. And so the argument may be made that to term them non-commercial is sanctimonious humbug." *Id.* at n. 19.

In *Bates*, this Court observed that the legal profession's prohibition on advertising "originated as a rule of etiquette and not as a rule of ethics . . . . But habit and tradition are not in themselves an adequate answer to a constitutional challenge . . . . The belief that lawyers are somehow "above" trade has become an anachronism." *Id.* at 371-72. So, too, has the time come for the bulwarks of the legal establishment—the firms—to recognize that they are not entitled to discriminate in the employment opportunities provided to their associates on the basis of sex, race, religion or national origin.

Reversal of the decision below will not remove a law firm's discretion to select partners deemed suitable for the firms particular needs by virtue of individual skills and qualifications. It will assure that no individual will have his or her professional career destroyed because of sex, race, religion or national origin.

III.

THE EFFECTS OF PERMITTING SEX DISCRIMINATION WOULD BE PERNICIOUS AND PERVASIVE.

"Women's activities and responsibilities are increasing and expanding. . . . The presence of women in business, in the professions, in government, and indeed in all walks of life . . . is apparent and a proper subject of judicial notice." *Stanton* v. *Stanton*, 421 U.S. 7, 15 (1975). Thus this Court recognized the advancing position of women in society, and now faces a decision which profoundly affects the full participation of women in professional life. If the Eleventh Circuit decision is allowed to stand, its effect would far exceed the limits of the instant case. Not only would Elizabeth Hishon be denied a remedy, but countless women and minorities could easily be ex-

cluded from a major, powerful segment of the professional population.

Congress and the courts have long supported the rights of women and minorities to be admitted to professional schools, and to be interviewed for professional positions, on an equal basis with majority males. Educational Amendments of 1980, Title IX, 20 U.S.C. §§1134 *et seq.* (Supp. IV 1980). It would be cruel and ironic to support women's entry into the professions only to permit employers to discriminate against them as they reach the final rung of the career ladder—partnership. Yet the effect of the Eleventh Circuit decision is precisely that.

The obvious long-term goal of any law student or lawyer interviewing for an associate position with a firm such as King & Spalding, is the chance to rise to the top of the firm and share in its decisonmaking and profits. J. Stewart, *The Partners* (1983); C. Epstein, *Women in Law* (1981).

A survey of the 119 Illinois law firms in 1982, with 15 or more attorneys, discloses out of 5738 total attorneys and 2892 total partners only 102, or 3.54%, of partners were women. Even more startling, 68 of the 119 firms have no women partners, 30 have only one woman partner, 9 firms have 2 women partners, 11 firms have from 3 to 5 women partners and one firm, with 163 attorneys and 87 partners, has 12 women partners.[1] The obvious conclusion drawn from these figures is that well over half the law firms in Illinois, with 15 or more attorneys, have *no* women involved in high-level decisonmaking.

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[1] These statistics were derived by counting the number of attorneys and partners listed in *Sullivan's Law Directory for the State of Illinois, 1982-83* (1982).

For any business entity to take advantage of the gap in Title VII coverage opened by the lower court it need only be organized, or be willing to organize, as a partnership. Not only are law firms traditionally partnerships, but so are accounting practices, architecture firms, medical practices, mortgage banking companies, advertising agencies and brokerage houses. They also share a reluctance to admit women to their higher ranks. There were about 7,000 partners nationwide in the Big 8 accounting firms in 1981. Wayne, *The Year of the Accountant*, New York Times, Business Section, Jan. 3, 1982. Of these 52 were women.[2] The architectural firm of Skidmore, Owens and Merrill, with 1500 architects in 9 offices, admitted its first and only woman general partner in the firm's 46 year existence on October 1, 1982. Block, *Women Build Own Stature as Architects*, Lerner Booster, March 2, 1983 at 1; *SOM Names Dianne Legge Lohan First Woman General Partner*, 4 Chicago Women in Architecture, June, 1982, at 2.

Judicial policies that discourage the application of Title VII to partnership and promotional decisions constitute judicial abdication inconsistent with congressional intent. The spector of this practice continuing to flourish with the *imprimatur* of Supreme Court approval is abhorrent. If Title VII cannot address invidious practices in regard to partnership decisions, there will be no remedy to prevent a large segment of American business from operating outside the Act, a result certainly not envisioned by Congress. Courts that promote an exception for legal partnerships do a disservice to the profession by attempting to

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[2] This figure is the result of a telephone survey performed in 1983 by the Chicago Society of Women Certified Public Accountants.

carve a special protected niche for their colleagues and setting professional partnerships at odds with every other type of American business, government, educational and charitable institution, and indeed, with the public interest.

CONCLUSION

For all the reasons stated herein, the Women's Bar Associations of Illinois and New York request that this Court reverse the decision of the Eleventh Circuit.

Respectfully submitted,

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No. 82-940.

In the
Supreme Court of the United States.

OCTOBER TERM, 1982.

ELIZABETH ANDERSON HISHON,
PETITIONER,

v.

KING & SPALDING,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT.

Brief of the Women's Bar Association of Massachusetts as Amicus Curiae.

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I. INTRODUCTION

The Women's Bar Association of Masschusetts, appearing as amicus curiae with the consent of both parties, supports the position of Petitioner Elizabeth Hishon that law-firm partnership decisions are covered by the protections of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e et seq. To exempt such decisions from Title VII coverage would be to carve out an exception to that statute's broad mandate of equal opportunity which is completely unjustified.

II. INTEREST OF AMICUS CURIAE

The Women's Bar Association of Massachusetts ("WBA") is an organization of women attorneys committed to improving the status of women in the legal community. The WBA was formed in 1978 in response to the rapid increase in the number of women admitted to the bar in Massachusetts. Currently, the

WBA membership is close to 500; many other women attorneys who are not members participate in WBA programs and activities. The WBA has a different focus from other established bar associations because the majority of its members are newer attorneys. As of 1982, 76 percent of the WBA members were admitted to practice in 1977 or later.

The relatively recent admission of most WBA members forms the basis of much of the organization's particular interest in this case. Because they are newer members of the bar, many women attorneys in larger law firms have not yet reached the point at which they will be considered for partnership.[1] That point, however, is quite close in the careers

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1. In the area served by the WBA, partnership decisions are made usually seven to ten years after an attorney has entered a firm.

of many members. Thus, these members have an interest in seeing that they receive the full protections of all laws which protect them from discrimination on the basis of sex when partnership decisions are made.

Members of the WBA who are not yet directly affected by partnership decisions also have an interest in making certain that law firms are covered by Title VII in partnership decisions. The treatment of women by law firms has a direct effect on how women attorneys are perceived in general. Until hiring and partnership opportunities for women in law firms exist on an equal basis with those for men, women in all forms of practice will not be viewed as equal to men, but will be seen as outcasts who could not "make it" in firms. Therefore, all the members of the WBA, regardless of the kind of practice in which they are enaged, have an interest in promoting equal opportunities in law firms. Therefore,

the WBA urges this Court to reverse the decision of the Eleventh Circuit exempting partnership decisions from Title VII.

III. SUMMARY OF ARGUMENT

Although women are becoming lawyers in much greater numbers, they are still underrepresented in the ranks of partners in law firms (pp. 5 - 10). Title VII's anti-discrimination purpose should be interpreted broadly to cover partnership decisions. (pp. 10-13). Because partnerships are like other"employers" and partners like other "employees" covered by the statute, law firm partnerships should not be exempt from Title VII coverage. (pp. 14-24). In addition, partnership can be viewed as an employment opportunity or a term of employment (pp. 24-28). Partnership decisions are amenable to judicial scrutiny, and the subjective nature of partnership decisions is not sufficient to

exclude them from the application of Title VII. (pp. 28-32).

IV. ARGUMENT

A. BACKGROUND: WOMEN ARE UNDERREPRESENTED IN LAW FIRMS.

Although the number of women practicing law has grown tremendously in the last decade, women partners in law firms are still extremely rare. The number of women partners does not reflect the proportion of women to the general population of lawyers.

Since 1970, the percentage of women in the law has increased dramatically. In that year, women comprised only 3 percent of lawyers;[2] the 1982 figures show women as 10-12 percent of the profession nationally.[3] In Massachu-

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2. American Bar Foundation, The 1971 Lawyer Statistical Report 5 (B. Sikes, C. Carson & P. Gorai eds. 1972)

3. See "Law Firms and Lawyers With Children: An Empirical Analysis of Family/Work Conflict," 34 Stan. L.R. 1263 n.5 (1982) (sets figure at 10 percent); Epstein Women in Law 4 (1981) (sets 1980 figure at 12 percent).

setts, the percentage of women is even higher. Out of 17,522 Massachusetts attorneys, 3,252, or 18.5 percent, are women.[4]

Law school figures reflect that this trend towards increasing numbers of women in the law will continue. Between 1969 and 1979, the number of women law students increased more than 700 percent.[5] In 1980-1981, approximately 35% of all law students were women.[6]

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4. Telephone conversation with staff of Massachusetts Bar Association, February 11, 1983.

5. See White, Law School Enrollment Continues to Level, 66 A.B.A. J. 724, 725 (1980), as cited in "Ethical Issues Facing Lawyer-Spouses and Their Employers," 34 Vand. L.R. 1435 and n.3 (1982).

6. See "Lawyers With Children", supra, at 1264 nn. 6-7.

The growth in the numbers of women lawyers is encouraging. The situation for women in law firms, however, is not as positive as the trend towards greater representation in the profession as a whole. Until the 1970's, many firms were reluctant to hire women lawyers, and it is only recently that larger firms in major cities have begun to employ women in sigificant numbers.[7]

Women partners in law firms are still a rarity. Their numbers and proportions are smaller than their percentages in the entire profession would merit. In 1980, there were 85 women partners out of a total of 3,987 partners in the top 50 law firms in the country, or 2.1 percent.[8] That same year, the number of women partners in New York's 21

7. See Epstein, supra, at 175-218 for a discussion of the history of discrimination against women lawyers in firms.

8. Epstein, supra, at 179.

largest law firms was 36.9 A tally of the women partners in Boston law firms with 15 or more lawyers in 1983[10] shows 53 out of a total of 1121, or 4.7 percent.[11]

More disturbing than the modest number of women partners, however, is the considerable number of law firms with no women partners. In 1980, more than 25 percent of large New York law firms had no women partners.[12] The 1983 figures for Boston show that more than

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9. Hoffman Lions of the Eighties 212-213 (1981).

10. Fifteen employees is the minimum number for Title VII coverage. 42 U.S.C. §2000e(b).

11. Figures were derived from listings in III Martindale Hubbell Law Directory (1983). Two law firms with over 15 lawyers did not distinguish between partners and associates in their listings; these firms were not included in the compilation.

12. Epstein, supra, at 179.

40 percent of the firms of 15 or more lawyers have no women partners. Even if partnership decisions are made six to ten years after a lawyer enters a firm,[13] these low numbers in the partnership ranks are not justified by the number of women entering the profession in those past years.[14]

Given this background of underrepresentation of women at the partnership level, it is crucial that all avenues for protecting women from discrimination on the basis of their sex remain open. Title VII provides protections against such arbitrary discrimination which should be available to women

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13. See Epstein, supra, at 202.

14. For example, the percentage of women in law school in 1969 was 6.9 percent; 1970 - 8.5 percent; 1971 - 9.4 percent; 1972 - 11.9 percent; 1973 - 15.8 percent; 1974 - 19.7 percent; 1975 - 22.8 percent; 1976 - 25.5 percent. See White, supra, at n5.

lawyers, whatever their level of career accomplishment.

B. TITLE VII SHOULD BE INTERPRETED BROADLY TO PROTECT AGAINST ALL FORMS OF SEX DISCRIMINATION IN EMPLOYMENT.

The purpose of Title VII is to protect women and minorities from all forms of arbitrary discrimination in the workplace. Both the language and intent of Title VII is broad enough to encompass partnership decisions within its protections.

Title VII makes it unlawful for an employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment . . .or;
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. §2000e-2.

The aim of this broad statute was to give every person equal job opportunities. Thus, Title VII has been interpreted to bar both discrimination which is intentional and discrimination which is the result of facially neutral policies having a disparate impact upon women or minorities. See Griggs v. Duke Power Co., 401 U.S. 424 (1971). "Every individual employee is protected against both discriminatory treatment and against 'practices that are fair in form, but discriminatory in operation' ". Connecticut v. Teal, _____ U.S. _____, 102 S. Ct. 2525, 2535 (1982), citing Griggs, supra, 401 U.S. at 431. (Emphasis in original).

Title VII provides that a victim of discrimination may obtain remedial action such as a back-pay award and/or reinstatement

to the job. 42 U.S.C. §2000e-5(g). Accordingly, this Court has repeatedly interpreted the statutory scheme broadly in order "to honor the remedial purpose of the legislation as a whole," Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 398 (1982). See also Franks v. Bowman Transportation Co., 424 U.S. 747, 763 (1976); Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974).

Title VII in no way dictates who must be selected for hiring or promotion. It merely prohibits certain characteristics from being considered in refusing to hire or promote a person. In a case such as this one, Title VII prohibits the denial of job opportunities for a woman attorney solely because she is a woman. The statute does not proscribe a law firm's use of any of the complex, subjective factors which go into choosing who will be made a partner, so long as those factors are not related to the sex of the person being

considered. As noted by one Court in applying Title VII to initial hiring decisions of law firms:

> The common question in both professional and non-professional employment situations is not whether one individual is better qualified than another, but whether that individual is considered less qualified, not because of his or her own worth, but because of discrimination forbidden by Title VII.

Kohn v. Royall, Koegel & Wells, 50 F.R.D. 515, 521 (S.D.N.Y. 1973).

Because Title VII has the broad remedial goal of eliminating discrimination from the workplace, it should be interpreted in this case to allow a challenge to law firm partnership decisions made on the basis of sex.

C. PARTNERSHIP DECISIONS ARE WITHIN THE PROTECTIONS OF TITLE VII.

The Eleventh Circuit took too narrow a view of Title VII when it ruled that

partnership decisions were exempt from that statute's protections. Hishon v. King & Spalding, 678 F. 2d 1022 (11th Cir. 1982). This Court should look to the realities of law firm structure as they relate to Title VII's intent rather than focusing on outmoded notions of the nature of partnerships. Such an examination will demonstrate that Title VII does apply to law firm partnership decisions.

1. Law Firm Partnerships Are "Employers" And The Partners Are "Employees" Of The Partnership For Purpose Of Title VII.

Law firms making partnership decisions are very similar to other employers whose decisions about employees subject to Title VII. Accordingly, the general characteristics of a partnership are not sufficient to take those decisions out of the protective reach of the statute.

The Eleventh Circuit ruled that partners could not be considered "employees"[15] entitled to the protections of the statute because the "very essence of a partnership is the voluntary joinder of all partners with each other." 678 F.2d at 1028. Therefore, the Court refused to accept the analogy between a large law firm and a corporation and concluded that law firm partnership decisions

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15. An "employer" must be a "person" who has fifteen or more "employees" in order to be subject to Title VII. 42 U.S.C. §2000e(b). Partnerships are specifically included in the definition of "person" for this purpose. 42 U.S.C. §2000e(a). Therefore, coverage turns on who can be considered an "employee". The definition of "employee" is not particularly helpful, referring to any "individual employed by an employer." 42 U.S.C. §2000e(f).

It should be noted, however, that this definition of "employee" by no means clearly bars inclusion of partners within its reach. Only certain elected or policy level state government officials are explicitly exempted from the definition. 42 U.S.C. §2000e(f). Since partnerships are specifically included in the definition of "employer," Congress could have exempted partners from coverage as "employees" if it desired. Obviously it has not done so.

cannot be subject to Title VII as are corporate or other employment selections. Ibid.

This approach does not give sufficient credence to the realities of a law firm's deciding if an associate will become a partner. First, it is clear that law firm partnerships are subject to Title VII when they make initial decisions as to whom to hire for associate positions. Kohn v. Royall, Koegell & Wells, supra. The legislative intent of Title VII was to eliminate job discrimination in the broadest way; discrimination in employment of professionals such as lawyers was specifically intended to be reached. Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123, 126 and n.3 (S.D.N.Y. 1977). See also Bartholet, "Application of Title VII to Jobs in High Places," 95 Harv. L. Rev. 947, 980-983 (1982) (hereinafter, "Jobs in High Places"). Therefore, law firms

themselves are not considered to be a different type of employment environment entitled to special consideration in the statutory scheme.

It is this broad scope of Title VII's reach that belies the notion that law firm partnership decisions are beyond the coverage of the statute. Where Congress intended to exempt certain institutions from Title VII, it did so explicitly. See McLure v. Salvation Army, 460 F.2d 553, 556-557. (5th Cir. 1972) (discussing exemption for certain hiring decisions of religious organizations).

The Court below determined that the voluntary nature of a partnership took it out of Title VII's intended scope. 678 F.2d at 1026-1928. The Court looked to the "essence" of a partnership under state and common law, and determined that Title VII could not negate this voluntary associational aspect with its anti-discriminatory mandates. Id. at 1028

("[W]e are unwilling to dictate partnership decisions under the guise of employment promotions protected by Title VII").

This approach is too deferential to traditional employment relationships which Title VII was aimed at changing. It is not sufficient to look at ways of conducting a business under common law in order to judge a Title VII claim. The passage of Title VII has changed those forms in profound ways; the statute could not possibly eradicate discrimination without doing so.[16]

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16. In its most basic terms, Title VII disturbs the historical doctrine of "at will" employment in which an employer can fire an employee for any reason at any time. Glendon and Lev, "Changes in the Bonding of the Employment Relationship: An Essay on the New Property," 20 B.C. L. Rev. 457 (1979). By injecting certain grounds on which termination decisions cannot be made (e.g. race, sex), the statute radically changed traditional employer/employee relationships.

For example, courts have used Title VII to prohibit businesses from discriminating against one sex because of "customer preference" as to who serves them. Diaz v. Pan American Airlines, 442 F.2d 385 (5th Cir.), cert. denied., 404 U.S. 950 (1971). This clearly places limitations on a business' traditional "freedom" to use certain selection criteria. Similarly, the widespread use of reinstatement to a job for victims of discrimination radically changes the traditional employer/employee relation. See 42 U.S.C. §2000e-5(g).

The concerns which the Eleventh Circuit evidenced toward the voluntary associational aspects of a partnership do not make sense in the context of Title VII.[17]

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17. The District Court went so far as to attach constitutional proportions to the associational rights of law firm partners. See Hishon v. King & Spalding, 24 FEP cases 1303 (N.D. Ga. 1980).

First, this case does not implicate any "freedom of association" rights under the first amendment. The associational interests of a businessperson in a commercial entity such as a law firm is not the same type of political or social association which has been given protection by this Court. See Granti v. Finkel, 445 U.S. 507 (1980); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958). See also "Tenure and Partnership as Title VII Remedies," 94 Harv. L. Rev. 457, 468-471 (1980).

Also, discrimination in selection of members has not been allowed even where there are constitutional rights to form an organization in the first place. See Railway Mail Assn. v. Corsi, 326 U.S. 88, 93-94, 98 (1945) (No right to discriminate in union membership even though right to form a labor union exists). See also Note, "Applicability of Federal Antidiscrimination Legislation to

the Selection of a Law Partner," 76 Mich. L. Rev. 282, 312-318 (1977). A strictly commercial undertaking such as a law firm partnership cannot be regarded in the same light as a social club.[18] The size of a large law firm such as King & Spalding here,[19] coupled with the commercial purpose of interaction between firm personnel during business hours, lessens the concern that any individual's associational interest will be harmed by "forced" interaction with another member.

In addition, the realities of law firm practice in this case render concern for associational freedoms misplaced. As

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18. Again, where Congress intended to exempt certain entities from Title VII's reach, it has done so explicitly, such as in the case of bona fide private membership clubs. 42 U.S.C. §2000e(b)(2).

19. As noted by the Eleventh Circuit, King & Spalding had 50 partners and 50 associates in 1982. Hishon, supra, 678 F.2d at 1024.

explained by the Court below, 678 F.2d at 1024, King & Spalding's normal procedure was to hire new lawyers as associates for six years and then consider them for partnership. If associates were not selected to become a partner, they left the firm. The petitioner in this case was employed as an associate in this manner. Therefore, other lawyers in the firm had already "associated" with her for at least six years prior to rejecting her for partnership, with no apparent dire consequence. If partners' associational interests were not harmed by the business contact for the previous six years, those interests should not be permitted to override the mandates of Title VII at such a late stage.

Second, any legitimate concerns about the need to protect the intimate nature of close business relationships in small enterprises has already been provided for in Title VII.

The statute does not cover businesses with fewer than 15 employees, 42 U.S.C. §2000e(b), and thus smaller partnerships where "forced contact" might cause problems are already exempt. See also 110 Cong. Rec. 13088 (1964) (comments of Senator Humphrey that businesses over 25 employees "lose most of whatever intimate, personal character they might have had"); "Applicability of Federal Antidiscrimination Legislation", supra, at 308-309.

Finally, the same kind of "forced contact" which application of Title VII would have to law firm partnerships has been an aspect of remedial orders in other Title VII cases without causing undue concern by courts. The day to day contact which a police officer has with other policemen or policewomen is much more interdependent than the daily contact a lawyer has with his or her partner. Similarly, factory personnel are often

dependent on co-workers for safety and production in a way lawyers are not. "Forced association" has not been an objection to Title VII's applicability in those circumstances. See "Jobs in High Places," supra, at 983-984.

It is apparent, then, that law firm partnerships should not be considered exempt from Title VII because they are any different from other employer/employee contexts. If this were true, then a law firm structured as a partnership could escape the dictates of Title VII, while the same firm operating as a professional corporation could not. The special characteristics of a law firm partnership perceived by the Eleventh Circuit do not stand up to scrutiny.

2. Law Firm Partnership Is A "Term Of Employment" for Title VII Purposes

Even if a law firm partnership is not considered an "employer" when it chooses

partners, the partnership selection is an employment opportunity or term of employment under Title VII.

In Lucido v. Cravath, Swaine & Moore, supra, the Court ruled that the opportunity to be considered for partnership was a "term, condition or privilege of employment" or an "employment opportunity" under Title VII, 42 U.S.C. §2000e(a)(1)-(2), even if it was assumed that a partnership itself is not covered as an employer of its partners by the statute. 425 F. Supp. 127-129. The Eleventh Circuit rejected this argument, with little analysis, concluding merely that "(d)ecisions as to who will be partners are not within the protection of Title VII." 678 F.2d at 1029. Similarly, the Eleventh Circuit rejected Elizabeth Hishon's termination from the firm under its "up or out" partnership selection process as depriving her of employment opportunities. Ibid.

Again, the approach of the Court below distorts the realities of law firm procedure and the intent of Title VII. It makes no sense to forbid a law firm from discriminating when it hires associates, see, e.g., Kohn v. Royall, Wells & Koegel, supra, and then permit a law firm to engage in any kind of discrimination it desires as it brings those associates up through the ranks to partner.

It could hardly be argued that Congress intended to prohibit discrimination only in the lowest rungs of the employment ladder. See generally, "Jobs in High Places," supra. Law firms have historically closed their partnership doors to minorities, even when a few minorities have been hired as associates. See Lions of the Eighties, supra, at 20 (discussing refusal of Wall Street firms to make their Jewish associates partners). See also Smith, "Career Patterns of Black Lawyers in the 1980's," 7 Black L.J. 75, 77 (1981)

(noting low number of black partners in largest firms, and pointing out that blacks who leave firms are often not replaced, lowering the total numbers). It would negate much of the purpose of Title VII's equal opportunity goals if law firms were permitted to create revolving "associate" doors for women and minorities, where those groups could be hired initially, but never promoted to the partnership level.

In addition, the subjective criteria used to select partners is just the sort of subjectivity which Congress was aware could work to the detriment of women and minorities. See Rowe v. General Motors Corp., 457 F.2d 348, 359 (5th Cir. 1972). See also Women in Law, supra, at 215-216 (Suggestion that women are held to stricter standards when partnership decisions are made because they do not fit the image of a "partner"). While applicability of Title VII would by no means

remove subjectivity from partnership selection, it would remove illegal factors related to race, sex, religion, or national origin from the subjective criteria. See Lucido, supra, 425 F. Supp. at 129. This is entirely consistent with Title VII's purpose.

D. JUDICIAL REVIEW OF PARTNERSHIP DECISIONS TO ENSURE COMPLIANCE WITH TITLE VII IS APPROPRIATE.

At the essence of the Eleventh Circuit's decision in this case is the notion that a Court is ill-equipped to intervene in the sensitive decisions as to who should be made a partner. See, e.g., 678 F.2d at 1028 ("We are unwilling to dictate partnership decisions under the guise . . . of Title VII"). This deference to partnership selection is unwarranted. Difficulties in evaluating whether a partnership decision is tainted with unlawful discrimination cannot form the basis

of refusing to apply anti-discrimination laws at all.

Courts have repeatedly shied away from using the same standards to evaluate sex or race discrimination in professional jobs that are used in the context of lower level jobs. "Jobs in High Places," supra, at 959-983. This differential treatment of upper level jobs is not supported by the legislative history or language of Title VII. Ibid.

The fear implicit in the Eleventh Circuit's decision is that law firm partnerships are sensitive entities whose innate nature would be ruined by judicial intervention. See, e.g., 678 F.2d at 1028 ("[W]e decline to extend the meaning of 'employment opportunities' beyond its intended context by encroaching upon individual's decisions to voluntarily associate in a business partnership"). This is akin to the extreme deference afforded tenure decisions in

many academic employment discrimination cases. See Faro v. New York University, 502 F.2d 1229, 1231-1232 (2d Cir. 1974) (Tenure decisions at the University level are "probably the least suited for federal court supervision").

This policy of deference to employment decisions at upper levels has been strongly criticized. As Judge Smith noted in Powell v. Syracuse University, 580 F.2d 1150, 1153 (2d Cir. 1978):

> This anti-interventionist policy has rendered colleges and universities virtually immune to charges of employment bias, at least when that bias is not expressed overtly. We fear, however, that the common-sense position we took in Faro, namely that courts must be ever-mindful of relative institutional competences, has been pressed beyond all reasonable limits, and may be employed to undercut the explicit legislative intent of the Civil Rights Act of 1964.

See also "Jobs in High Places," supra.

Simply because it appears at first to be so difficult to evaluate whether a professional employment decision was

justified, see Faro, supra, 502 F.2d at 1232, Courts cannot refuse to apply anti-discrimination laws at all. As noted by one commentator, judges are, by virtue of their familiarity with the jobs involved, probably much more able to evaluate whether a promotion decision involving a professor or lawyer was justified than, for example, whether one involving a factory foreman was appropriate. "Jobs in High Places," supra, at 979-980.

More basically, a plaintiff claiming discrimination in law firm partnership selection would have to prove that he or she were "qualified" to become a partner in order to prevail. McDonnell Douglas Corporation v. Green, 411 U.S. 792, 802 (1973). Thus, the complex factors which go into making a partnership decision would be accounted for in establishing liability under Title VII. See "Tenure and Partnership," supra, at 471-472.

The only factors which could not be taken into consideration would be those forbidden by Title VII - race, sex, national origin, and religion. Therefore, a partnership could still decide that it did not want to promote an associate because she ate too much at firm social functions, or because he wore tennis shorts to the office on a Saturday. So long as those reasons were not a pretext for unlawful discrimination, they could still form the basis for partners to make their extremely selective decisions as to who could be admitted into the partnership. See Board of Trustees v. Sweeney, 439 U.S. 24 (1978). Accordingly, the delicate chemistry of law firm partnerships would not be disturbed except to promote the same goals of equal opportunity applicable in other employment contexts under Title VII.

V. CONCLUSION

Law firm partnerships are very similar to other types of employers subject to Title VII.

They cannot discriminate on the basis of sex in hiring associates; it makes no sense to interpret Title VII in a manner that lets firms discriminate six years later when those associates are considered for partnership. Both the language and intent of Title VII is broad enough to encompass law firm partnership decisions. Therefore, the Eleventh Circuit decision in this case should be reversed.

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FOR THE WOMEN'S BAR
ASSOCIATION OF
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In the Supreme Court of the United States

OCTOBER TERM, 1982

ELIZABETH ANDERSON HISHON, PETITIONER

v.

KING & SPALDING

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING REVERSAL

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QUESTION PRESENTED

Whether a law firm organized as a partnership violates Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*), if one of the associates in its employ is denied, on the basis of her sex, an equal opportunity to be considered for admission to the partnership.

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BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING REVERSAL

INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The United States and the Equal Employment Opportunity Commission share responsibility for enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. V) 2000e *et seq.* This case presents an important question concerning the coverage of Title VII. Its resolution will affect the Commission's powers to enforce Title VII against private employers, and the Court's analysis of the issues may also affect the ability of the United States to enforce Title VII.

STATEMENT

1. Petitioner is a woman attorney; respondent is a law firm consisting of approximately 50 partners. Respondent employs approximately 50 attorneys as associates. Respondent hired petitioner as an associate in 1972, shortly

after she graduated from law school. At the time this suit was brought, no woman had ever been a partner of respondent. Pet. App. A2; J.A. 6-7, 30.

According to petitioner's complaint, the allegations of which are to be accepted as true, respondent represented to petitioner and "to other law students, and young lawyers whom the firm was seeking to employ" that respondent would hire them as associates "with the expectation that the associate lawyer will be promoted and become a partner in the * * * firm on a fair and equal basis and within a reasonable period of time" (J.A. 8-9). Respondent further represented that "[a]ssociates who receive satisfactory evaluations from the firm will be promoted and made partners in the firm as a matter of course after [a] five or six year period of apprenticeship." *Id.* at 9. Petitioner alleged that she accepted employment with respondent in "reliance upon the[se] representations and assurances" (*ibid.*).

In May 1978, approximately five and one-half years after petitioner was hired, respondent purported to consider petitioner for partnership, but decided not to make her a partner. One year later, petitioner was again refused an invitation to partnership. Petitioner was advised that, under the firm's "up or out" policy, her employment as an associate would be terminated at the end of 1979. Pet. App. A2-A3; J.A. 12-13

2. Petitioner then filed a charge with the Equal Employment Opportunity Commission (J.A. 17-22), claiming that respondent had discriminated against her because of her sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. V) 2000e *et seq.* The Commission issued a notice of right to sue (J.A. 24-25), and petitioner brought this action in the United States District Court for the Northern District of Georgia, challenging both the decision

not to invite her to join the partnership and her discharge. She sought declaratory and injunctive relief, back pay, and compensatory damages "in lieu of reinstatement and promotion to partnership" (*id.* at 15-16).

The district court dismissed the complaint, ruling that petitioner had failed to state a claim under Title VII. Pet. App. A17-A25. The district court appeared to conclude that the partners of a law firm have a "constitutional right to freedom of association" that would be violated if they were required not to discriminate on the basis of race or sex in choosing partners from among their associates. *Id.* at A24. The district court stated that respondent's "right * * * to freedom of association seems clear," whereas it is not clear whether Title VII was intended to apply to the selection of a partner. *Ibid.* The court accordingly held that it would not interpret Title VII to reach petitioner's claim. *Id.* at A18.

A divided court of appeals affirmed. Pet. App. A1-A16. The majority did not purport to find that respondent had a constitutional right that would be violated by the application of Title VII. Instead, the majority concluded (*id.* at A6): "Even under the most liberal reading we cannot find the requisite congressional intent to permit Title VII's intervention into matters of voluntary association."

The majority first considered the contention that respondent's partners should be viewed as "employees" for Title VII purposes, so that discrimination in the selection of a partner would necessarily be employment discrimination prohibited by Title VII. The majority rejected this contention on the ground that respondent's "partners own the partnership; they are not its 'employees' under Title VII." Pet. App. A10. The majority then considered petitioner's narrower contention that the opportunity to be admitted to the partnership was a term or condition of her employment

as an associate, so that discrimination in selecting partners from among the associates would violate Title VII. The majority said that it had "no quarrel with the premise" (*id.* at A11) that Title VII may prohibit an employer from discriminating among its employees with respect to opportunities for advancement to other positions, even if those positions are not themselves covered by Title VII. But in this case, the majority said, applying Title VII to the decision challenged by petitioner would require "encroaching upon individuals' decisions to voluntarily associate in a business partnership." *Ibid.* The majority accordingly concluded that "[d]ecisions as to who will be partners are not within the protection of Title VII." *Id.* at A13.

Judge Tjoflat dissented. He noted that, in view of the "up or out" policy, the challenged decision was a decision both to refuse petitioner a partnership and to discharge her. Pet. App. A15. Judge Tjoflat stated that he would "agree that Title VII would not apply to the discrete decision whether to take on a new partner." *Id.* at A16 (footnote omitted). But, he added, "when the partnership decision inextricably and inevitably is a decision whether to terminate employment, I would hold tnat Title VII applies." *Ibid.* (emphasis omitted).

SUMMARY OF ARGUMENT

The plain language of Title VII prohibits employers — including law firms — from treating male employees better than equally qualified female employees. Whatever the status of partners under Title VII, it is undisputed that a law firm's associates are its employees. Therefore, the terms of Title VII prohibit a law firm from discriminating among its associates on the basis of sex when it considers them for advancement, including advancement to partnership. The contrary decisions of the district court and court of appeals were based on the conclusion that decisions pertaining to partnerships are simply exempt from the normal operations

of Title VII. Neither the statute nor its legislative history provides any basis for creating such an exemption.

A. 1. Section 703(a)(1) of Title VII makes it unlawful for "an employer * * * to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's * * * sex * * *." 42 U.S.C. 2000e-2(a)(1). There is no dispute that the relationship between respondent and its associates is one of "employment." The only remaining question is whether the opportunity to be admitted to partnership was a "term, condition, or privilege" of petitioner's employment as an associate.

We submit that the answer is clearly "yes." The statutory language seeks to prohibit all discrimination "in connection with employment" (110 Cong. Rec. 7213 (1964)) and to reach everything that is "an aspect of the relationship between the employer and employees" (*Allied Chemical & Alkali Workers, Local No. 1* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971)). The prospect of advancement is a critical element in most employment relationships; the relationship between associates and law firms is no exception. The opportunity to become a partner is crucial to a young lawyer's decision whether to accept employment as an associate with a firm that recruits partners from among its associates. It is also vital to the firm's efforts to attract young associates from whom it will select its partners in the future. The prospect of becoming a partner remains a central preoccupation of both the firm and the associate during the associate's period of employment. An associate's professional development is both shaped and evaluated with the prospect of advancement to partnership in mind. In view of the pervasive influence that the opportunity to become a partner has on the associate's choice of a firm, the firm's ability to recruit associates, and the associates'

working lives, it is difficult to imagine a more obvious aspect of "compensation, terms, conditions, or privileges of employment."

Whether partners are themselves employees is immaterial; the phrase "compensation, terms, conditions, or privileges" of employment comprises many elements that do not themselves constitute employment. It is also immaterial that advancement to partnership occurs just as the associate's employment as an associate is ending; such things as pensions and severance pay take effect only when employment is completed, but they are undoubtedly "compensation, terms, conditions, or privileges of employment."

2. A law firm that discriminates on the basis of sex in affording its associates the opportunity for admission to partnership also violates Section 703(a)(2) of Title VII, 42 U.S.C. 2000e-2(a)(2). Such discrimination "adversely affect[s] * * * [an associate's] status as an employee" and "deprive[s] * * * [the associate] of employment opportunities."

B. Neither the court of appeals nor the district court denied that discrimination in affording associates the opportunity to advance to partnership violates the prohibitions of Sections 703(a)(1) and (2). Instead, the courts below concluded that a law firm's decisions about who is to become a partner somehow constitute a protected enclave in which the plain language of Title VII does not apply. Nothing in the statute or its legislative history supports this notion. Congress did enact certain explicit exceptions to Title VII; those exceptions carefully delimit the area in which Congress wished to protect associational interests from the coverage of Title VII. In fact, Congress specifically considered whether Title VII should apply to "sensitive" decisions about associations among professionals, and made unequivocally clear its determination that Title VII should apply to such decisions.

ARGUMENT

TITLE VII PROHIBITS RESPONDENT FROM DISCRIMINATING ON THE BASIS OF SEX IN ADMITTING ITS ASSOCIATES TO PARTNERSHIP

A. The Opportunity To Be Admitted to the Partnership Was a Term, Condition, and Privilege of Petitioner's Employment as an Associate; Respondent Therefore Had to Consider Her for Admission on a Nondiscriminatory Basis

1. a. Section 703(a)(1) of Title VII makes it unlawful for "an employer * * * to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's * * * sex * * *." 42 U.S.C. 2000e-2(a)(1). Petitioner alleged that respondent discriminatorily denied her an equal opportunity to advance to partnership because of her sex—a straightforward and simple claim of disparate treatment. So far as the language of Section 703(a)(1) is concerned, petitioner has stated a claim under Title VII if the opportunity to be advanced to partnership was one of the "terms, conditions, or privileges" of her "employment" as an associate.

Whatever the relationship between respondent and its partners, there is no dispute that the relationship between respondent and its associates was and is one of "employment."[1] Neither the district court nor the court of appeals suggested otherwise; indeed, respondent appears to have conceded in the court of appeals that it employed its associates. Resp. C.A. Br. 23. As an associate, petitioner worked

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[1] A partnership is explicitly included among those entities capable of being an "employer" under Title VII. 42 U.S.C. (Supp. V) 2000e(a) and 42 U.S.C. 2000e(b).

for a salary and had no ownership interest or management role in the firm. See also *Lucido* v. *Cravath, Swaine & Moore*, 425 F. Supp. 123, 127 (S.D.N.Y. 1977); *EEOC* v. *Rinella & Rinella*, 401 F. Supp. 175, 179-181 (N.D. Ill. 1975).

The further question is whether the opportunity to be admitted to the partnership was one of the "terms, conditions, or privileges" of petitioner's employment. We submit that there can be no doubt that the answer is "yes."

Neither Title VII itself nor its legislative history specifically defines "compensation, terms, conditions, or privileges of employment"; but the obvious and cumulative breadth of the statutory phrase makes it clear that Congress wished to insulate against discrimination *all* aspects and incidents of the employment relationship. As the "authoritative" (*International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 352 (1977)) memorandum submitted by the Senate floor managers of the proposed legislation that became Title VII explained, Title VII broadly prohibits discrimination "in connection with employment" (110 Cong. Rec. 7213 (1964)). Moreover, the comparable phrase "terms and conditions of employment" in the National Labor Relations Act, 29 U.S.C. 158(d) — which was in many respects the model for Title VII[2] — includes everything that is "an aspect of the relationship between the employer and employees." *Allied Chemical & Alkali*

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[2]See generally *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 768-770 (1976). Congress used the "terms and conditions" language in Title VII for the same reason that it used it in the NLRA — because it is impractical to list every aspect of the employment relationship that might come to be at issue. Compare 110 Cong. Rec. 12618 (1964) (remarks of Sen. Muskie) with *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 495-496 (1979). Indeed, if anything, Congress, by adding "privileges" of employment, broadened the NLRA concept when it enacted Title VII.

Workers, Local No. 1 v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971), citing *NLRB* v. *Borg-Warner Corp.*, 356 U.S. 342, 350 (1958).

To say that the prospect for advancement to partnership is "an aspect of the relationship" between the associate and a law firm is an understatement. The possibility of admission to the firm is the central element in this employment relationship, of critical importance to both the associate and the firm. Petitioner's allegations must be taken to show — and respondent cannot plausibly deny — that the prospect of becoming a partner is crucial to a young lawyer's decision whether to accept employment as an associate of a particular firm. For the firm, the opportunity of admission to the partnership is a vital inducement in attracting young associates to the firm; and it is these associates who will, in turn, constitute the pool from which the partnership will select its new members. In fact, a partner who supervised associates during the period when petitioner worked for the firm stated, in an affidavit submitted in respondent's behalf, that "most of the lawyers considered for partnership are considered after having joined the firm following law school or judicial clerkships and after working at the firm as an associate for a number of years." J.A. 45.

Once associates join a firm, their tenure as associates in many ways constitutes an apprenticeship for partnership. Their work is evaluated primarily to determine whether they will qualify to become partners. Respondent's "up or out" policy (J.A. 32-33, 48) shows that an associate who is not a potential partner has no place in the firm. Thus the opportunity to become a partner, and the firm's consideration of the associate for partnership, shape the entire relationship between the firm and its employee.

Respondent's own statements again demonstrate these points. Respondent said in its answer that "all associates are employed with the expectation that they will be considered

for invitation to partnership on a fair and equal basis within a reasonable period of time if they meet the firm's standards for partnership" (J.A. 30-31). Partners of respondent who supervised associates explained in affidavits that associates are evaluated each year by the firm, and that these evaluations are intended both to guide the associates' professional development and to assess their suitability for partnership. *Id.* at 46-47; see *id.* at 51-52. For example, petitioner was allegedly told "at the end of her fourth year * * * that she was making progress, but that additional progress would have to be made for her to be considered for a partner." *Id.* at 52.

In sum, the opportunity to become a partner is held out to associates by respondent and other major law firms as a privilege of employment that makes joining the firm more attractive. Reciprocally, partnership opportunities are considered by associates as an important term of their employment and an incentive to work for the firm. And once associates are employed at a firm, the prospect of partnership has a pervasive effect on the conditions of their working lives; it dictates the course of their development, and it provides the standard against which they are measured. It is difficult to imagine a more obvious aspect of "compensation, terms, conditions, or privileges of employment."

The fundamental and simple point here is that Title VII forbids law firms to treat male employees better than female employees on account of sex. Thus, once a firm adopts a practice of elevating its employees (associates) to partnership — whether or not as a matter of express policy or agreement — it may not treat male associates better than female associates with respect to this possibility of advancement. It may not use a two-track, discriminatory advancement system. If respondent discriminated against its women associates in providing dining or recreational facilities, it would violate Title VII. See 110 Cong. Rec. 12723 (1964)

(remarks of Sen. Humphrey) (Title VII prohibits discrimination in "pay, conditions, or facilities"); cf. *Ford Motor Co.* v. *NLRB*, 441 U.S. 488 (1979). A Congress that sought to outlaw discrimination "in connection with employment" (110 Cong. Rec. 7213 (1964)) could not have intended to prohibit discrimination with respect to such matters while permitting discrimination with respect to the opportunity for advancement that is, in this employment relationship, the central preoccupation of both the employer and the employee.

b. It is no answer to say that partners are not themselves employees. The court of appeals and the district court discussed in detail the question whether partners are employees for Title VII purposes (Pet. App. A8-A10, A17-A19, A22-A23), but that question is immaterial to the issue whether an opportunity to advance to partnership is a term, condition, or privilege of an *associate's* employment.[3] "[T]erms, conditions, or privileges" of employment are made up of many elements that do not themselves constitute "employment" and are therefore not directly covered by Title VII. For example, Title VII does not directly forbid discrimination in providing health or disability insurance. But if employers provide such insurance to their employees, they cannot discriminate on the basis of race or sex in doing so. See, *e.g.*, *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976).

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[3]We believe that this case can and should be disposed of on the ground that where, as shown in this case, the opportunity to become a partner is a term, condition, or privilege of an associate's employment, Title VII is violated if that associate is denied that opportunity on the basis of sex. There is therefore no need in this case to consider the broader question whether and under what circumstances a partner might be viewed as an "employee" of the partnership for Title VII purposes. Cf. *Goldberg* v. *Whitaker House Cooperative, Inc.*, 366 U.S. 28 (1961).

Similarly, it is immaterial that advancement to partnership occurs just as an associate's employment as an associate is completed. It is well settled that pensions are a term or condition of employment under Title VII. See, *e.g.*, *Chastang* v. *Flynn & Emrich Co.*, 541 F.2d 1040, 1042 (4th Cir. 1976); *Peters* v. *Missouri-Pacific R.R.*, 483 F.2d 490, 492 n.3 (5th Cir.), cert. denied, 414 U.S. 1002 (1973); *Rosen* v. *Public Service Elec. & Gas Co.*, 477 F.2d 90, 94-95 (3d Cir. 1973); *Bartmess* v. *Drewrys U.S.A., Inc.*, 444 F.2d 1186, 1188 (7th Cir.), cert. denied, 404 U.S. 939 (1971). See also *City of Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702 (1978). If respondent had a practice of hiring paralegals for a single term of a few years and paying severance bonuses based on merit, it surely could not discriminate on the basis of race or sex in deciding who was to receive the bonuses; discrimination in considering associates for partnership is indistinguishable.[4]

2. Discrimination on the basis of sex in the selection of associates to be partners also violates Section 703(a)(2) of Title VII, 42 U.S.C. 2000e-2(a)(2). That provision makes it unlawful for "an employer * * * to limit, segregate, or classify his employees * * * in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's * * * sex * * *." The prospect of becoming a partner is an integral aspect of an associate's "status as an employee." If a law firm adopted an explicit

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[4]This case involves no questions of relief. We note that petitioner apparently does not seek to be made a partner (J.A. 16) and that this Court has held that the district courts retain discretion in fashioning equitable relief. See *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 421 (1975). See also *Taylor* v. *Teletype Corp.*, 648 F.2d 1129, 1139 (8th Cir.), cert. denied, 454 U.S. 969 (1981).

policy that only male associates could be considered for partnership, or that female associates would have to meet more exacting standards, it would undoubtedly have limited and classified its employees in a way that adversely affected women associates' status as employees. Similarly, as even the court of appeals acknowledged (Pet. App. A11; see also *id.* at A23), an "employment opportunity" within the meaning of Section 703(a)(2) need not be an opportunity for further employment; it can be an opportunity associated with employment.

It is true that petitioner principally alleged discrimination only against herself — although her complaint does also claim that respondent had "an established custom, practice and policy" of discriminating against women in selecting partners (J.A. 11; see also *id.* at 13) — and the language of Section 703(a)(2) can be more readily applied to employment decisions that affect entire categories of employees. See, *e.g., Nashville Gas Co.* v. *Satty*, 434 U.S. 136 (1977). But there is no reason to believe that Congress intended to require a plaintiff seeking to recover under Section 703(a)(2) to bring a class action or to prove discrimination against others besides herself. Discrimination on the basis of the criteria enumerated in Title VII is, by its very nature, discrimination that tends to "classify" or "limit" individuals on the basis of their membership in a group. See *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395, 405 (1977). Cf. *International Brotherhood of Teamsters* v. *United States, supra*, 431 U.S. at 359 & n.45.

B. Decisions Concerning the Selection of Partners Are Not Insulated from the Prohibitions of Title VII

Neither the court of appeals nor the district court denied that the opportunity to be considered for partnership is a term, condition, or privilege of an associate's employment. Nor did the courts below deny that if a firm discriminated

against women when considering associates for admission to partnership, this would deprive an associate of "employment opportunities" and "adversely affect" the associate's "status as an employee." Section 703(a)(2), 42 U.S.C. 2000e-2(a)(2). But the courts nonetheless concluded that petitioner did not state a claim under Title VII because they believed that the prohibitions of Title VII simply do not apply to decisions about whom to admit to partnership. As the court of appeals put it, "[d]ecisions as to who will be partners are not within the protection of Title VII." Pet. App. A13.

The court of appeals and the district court failed to cite a single provision in Title VII, or a single line from its legislative history, to support this notion. There is no basis for the conclusion that decisions relating to the composition of a partnership are somehow a specially protected enclave in which the plain language of Title VII does not apply. No provision of Title VII specifies special treatment for law firms or partnerships. And nothing in the legislative history suggests that the prohibitions of Section 703(a) do not apply, in accordance with their language, where a firm discriminates against a woman associate with respect to a matter — such as admission to the partnership — which is clearly a term, condition, or privilege of employment. The court of appeals repeatedly emphasized "the essence of a partnership — voluntary association." Pet. App. A2; see *id.* at A6, A10, A11. But all employment relationships are the result of voluntary associations, and many of the most conventional forms of employer-employee relationships can involve relatively intimate associations.

In fact, there is strong evidence that Congress intended Title VII to apply, in accordance with its terms, to decisions comparable to a law firm's selection of partners from

among its associates.[5] Where Congress wanted to afford special protection to a particular sort of association, it did so explicitly in the statute itself.[6] For example, certain bona fide private membership clubs are exempt from Section 703(a). 42 U.S.C. 2000e(b)(2). Title VII explicitly does not apply "to a religious corporation, association, educational institution, or society with respect to the employment of

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[5]See generally H.R. Rep. No. 914 (Pt. 2), 88th Cong., 1st Sess. 29 (1963) (separate views of Rep. McCulloch and others) (envisioning that Title VII would apply to "teachers, doctors, lawyers, scientists, and engineers").

[6]The district court plainly erred in making the suggestion—abandoned by the court of appeals — that the Constitution might bar applying Title VII to respondent's choice of partners from among its associates. The constitutionally protected freedom of association is, of course, not a freedom to associate — or to refuse to associate — in any capacity with whomever one chooses. Governments impose a variety of constraints, of unquestioned constitutionality, on business associations. Indeed, state and local governments preclude large numbers of persons — such as all those who are not members of the bar — from joining respondent in the practice of law; there is no reason to believe that precluding a person from joining an association is any less of an invasion of associational rights than prohibiting the association from discriminating in choosing members.

In general, "group association is protected because it enhances '[e]ffective advocacy.' " *Buckley* v. *Valeo*, 424 U.S. 1, 65 (1976), quoting *NAACP* v. *Alabama*, 357 U.S. 449, 460 (1958). See also *Democratic Party of the United States* v. *Wisconsin ex rel. La Follette*, 450 U.S. 107, 121 (1981) (the "First Amendment freedom to gather in association for the purpose of advancing shared beliefs"). Associations of lawyers can, of course, be protected from interference with their efforts to engage in activities protected by the First Amendment. See, *e.g.*, *NAACP* v. *Button*, 371 U.S. 415 (1963). But there has been no suggestion in this case that respondent's ability to advance political views will be hampered if it must accept as partners qualified women and minority associates. See also *Norwood* v. *Harrison*, 413 U.S. 455, 470 (1973) ("Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections."); *Runyon* v. *McCrary*, 427 U.S. 160, 176 (1976); *Railway Mail Ass'n* v. *Corsi*, 326 U.S. 88, 93-94 (1945).

individuals of a particular religion to perform work connected with the carrying on by such [organization] * * * of its activities." 42 U.S.C. 2000e-1. Also, employers with fewer than a certain number of employees — generally 15 —are not subject to Section 703(a) (42 U.S.C. 2000e(b)), and the legislative history suggests that Congress believed this exception would fully protect individuals' interests in private association. See 110 Cong. Rec. 13088 (1964) (remarks of Sen. Humphrey) (when firms employ more than the threshold number, they "lose most of whatever intimate, personal character they might have had"). Thus a law firm that employed fewer than 15 persons could not be subject to Section 703(a). But in view of Congress's carefully drafted explicit exceptions, there is no warrant for creating an additional, implicit exception to the act. See *County of Washington* v. *Gunther*, 452 U.S. 161, 178 (1981) ("We must * * * avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate.").

In addition, in 1972, when Congress comprehensively amended Title VII, it directly confronted the issues that arise in applying Title VII to decisions as sensitive as the decision whether to admit an associate to partnership in a law firm. Congress made clear its determination that Title VII apply in such instances. First, Congress extended Title VII to educational institutions, which had been exempt.[7] In doing so, Congress could not have been unaware that its action would affect selections to many tenured positions. Congress's particular concern was with higher education, and especially with "major faculty positions" in institutions of higher education (118 Cong. Rec. 1992 (1972) (remarks of Sen. Williams); see H.R. Rep. No. 92-238, 92d Cong., 1st

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[7]Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103 (amending 42 U.S.C. (1970 ed.) 2000e-1).

Sess. 19-20 (1971); S. Rep. No. 92-415, 92d Cong., 1st Sess. 11-12 (1971)), and it is now well established that Title VII applies to universities' tenure decisions. See, *e.g., Lieberman* v. *Gant*, 630 F.2d 60 (2d Cir. 1980); *Kunda* v. *Muhlenberg College*, 621 F.2d 532 (3d Cir. 1980). Congress's willingness to remove an explicit exemption for a category of decisions — selections to tenured positions in a community of scholars and educators — that are surely as sensitive as a law firm's choice of partners rebuts the contention that the courts should create an exemption for partnerships that Congress never enacted.

Second, in 1972 Congress rejected a proposed amendment to Title VII that would have exempted "the employment of physicians or surgeons by public or private hospitals" (118 Cong. Rec. 3800 (1972)). Senator Williams, speaking in opposition to the amendment, said (118 Cong. Rec. 3800-3801 (1972)):

> [The proposed amendment] goes to some fundamental principles. * * * I think that we would be stepping back 100 years. * * * * * We have seen, during the course of debate * * *, that minorities and women have been, and continue to be, denied access to high-level and professional job categories. * * * * * This amendment stands out among all those proposed as representing exactly the opposite of what we should be doing in this country, which is opening up opportunities for everyone.

Senator Javits opposed the amendment in similar terms (118 Cong. Rec. 3801-3802 (1972)):

> [T]his amendment is so completely regressive that it does not just try to undo what is in this bill, but it tries to undo what we did in the bill passed 8 years ago, in 1964. That is what the amendment is directed to. It

proposes to undo a measure we enacted in 1964, about which we have heard no complaints. * * *

* * * * *

One of the things that those discriminated against have resented the most is that they are relegated to the position of the sawers of wood and the drawers of water; that only the blue collar jobs and ditchdigging jobs are reserved for them; and that * * * they cannot ascend the higher rungs in professional and other life.

* * * * *

[T]his amendment would go back beyond decades of struggle and of injustice, and reinstate the possibility of discrimination on grounds of ethnic origin, color, sex, religion — just confined to physicians or surgeons, one of the highest rungs of the ladder that any member of a minority could attain — and thus lock in and fortify the idea that being a doctor or a surgeon is just too good for members of a minority, and that they have to be subject to discrimination in respect of it, and the Federal law will not protect them.

This would be most iniquitous. I simply cannot believe that in this year it would be seriously entertained as a possibility by way of exemption from this bill.

I hope very much, almost in self-respect, that the Senate will decisively reject this amendment.

Senators Williams and Javits were floor managers of the 1972 revision of Title VII (118 Cong. Rec. 1970 (1972)), and the amendment exempting physicians was rejected immediately after they spoke. 118 Cong. Rec. 3803 (1972). Their remarks clearly show that Congress intended the statute to apply to professional jobs where people work together as closely as partners in a law firm, and where the choice of an

individual for a position is as sensitive as the choice of a partner from among associates.[8]

It is clear, therefore, that Congress did not intend to create a special enclave for law partnerships within which they are free to discriminate against their employees with respect to the "terms, conditions, or privileges of employment." The case returns, then, to its simple and straightforward essence. Petitioner, an employee of respondent, alleged that respondent discriminated against her with respect to a critical term, condition, and privilege of her employment: her opportunity for advancement to partnership in the firm. It is a central purpose of Title VII to prohibit such discrimination, and we ask this Court to so hold.

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[8]This case does not call for a decision whether and under what circumstances a law firm can so structure its selection of partners that the opportunity for partnership would not be a term, condition, or privilege of the employment of its associates. It is not difficult to predict, however, that a firm that wholly divorced its partnership selection process from its relationship with its associates would have enormous difficulty in attracting associates to join it — and this shows yet again that, in the real world, the opportunity to advance to partnership is a critical element of the employment relationship.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MAY 1983

DOJ-1983-05

No. 82-940-CFX
Status: GRANTED

Title: Elizabeth Anderson Hishon, Petitioner
v.
King and Spalding

Docketed:
December 3, 1982

Court: United States Court of Appeals
for the Eleventh Circuit

Counsel for petitioner: Bondurant II, Emmet J.

Counsel for respondent: Morgan Jr., Charles

Entry	Date	Note	Proceedings and Orders
1	Dec 3 1982	G	Petition for writ of certiorari filed.
2	Dec 29 1982		Brief of respondent King & Spalding in opposition filed.
3	Jan 5 1983		DISTRIBUTED. January 21, 1983
4	Jan 7 1983	G	Motion of Connecticut Women's Educational and Legal Fund, Inc., et al. for leave to file a brief as amici curiae filed.
5	Jan 10 1983	G	Motion of Women's Bar Association of Illinois for leave to file a brief as amicus curiae filed.
6	Jan 17 1983		DISTRIBUTED. Jan. 21, 1983. (Motion of Women's Bar Assn. of Illinois to file a brief as amicus curiae).
7	Jan 17 1983		DISTRIBUTED. Jan. 21, 1983. (Motion of Connecticut Women's Educational & Legal Fund to file amicus brief).
8	Jan 24 1983		Motion of Connecticut Women's Educational and Legal Fund, Inc., GRANTED.
9	Jan 24 1983		Motion of Women's Bar Association of Illinois for leave to file a brief as amicus curiae GRANTED.
10	Jan 24 1983		Petition GRANTED.
			**********
12	Feb 1 1983		Order extending time to file brief of petitioner on the merits until April 9, 1983.
13	Feb 22 1983		Record filed.
14	Mar 16 1983		Order further extending time to file brief of petitioner on the merits until May 9, 1983.
15	Mar 21 1983	G	Motion of the parties to unseal the record filed.
16	Mar 22 1983		DISTRIBUTED. March 25, 1983. (Motion of petitioner to unseal the record).
23	Mar 28 1983		Response of respondent joining motion of petitioner to unseal the record filed.
24	Mar 28 1983		Motion of the parties to unseal the record GRANTED.
25	May 9 1983		Brief of petitioner Elizabeth A. Hishon filed.
26	May 9 1983		Joint appendix filed.
27	May 9 1983	G	Motion of Robert Abrams, et al. for leave to file a brief as amici curiae filed.
28	May 7 1983		Brief amicus curiae of Dallas Assoc. of Black Women Attorneys, et al. filed.
29	May 10 1983		Brief amicus curiae of Women's Bar Assn. of MA filed.
30	May 10 1983		Brief amicus curiae of American Civil Liberties Union filed.
32	May 10 1983		Order extending time to file brief of respondent on the merits until August 8, 1983.
33	May 10 1983		Brief amicus curiae of NAACP Legal Defense and Educational Fund, Inc. filed.
34	May 11 1983		Brief amicus curiae of Women's Bar Assn. of Illinois and Nou

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Entry	Date	Note	Proceedings and Orders
			York filed.
35	May 12 1983		Brief amicus curiae of American Assn. of Univ. Women, et al. filed.
36	May 12 1983		Brief amicus curiae of California Women Lawyers, et al. filed.
37	May 12 1983		Brief amicus curiae of Anti-Defamation League of B'nai B'rith, et al. filed.
38	May 10 1983		Brief amicus curiae of United States and EEOC filed.
39	May 24 1983	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
40	May 25 1983		DISTRIBUTED. June 9, 1983
41	May 31 1983		Motion of Robert Abrams, et al. for leave to file a brief as amici curiae GRANTED.
42	Jun 13 1983		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
43	Jun 9 1983		Application for leave to exceed the page limits on respondent's brief on the merits filed with LFP (A-987).
44	Jun 10 1983		Order granting same not to exceed 75 pages by Powell, J.
45	Jun 10 1983	G	Motion of New England Legal Foundation for leave to file a brief as amicus curiae filed.
46	Jun 20 1983		Motion of New England Legal Foundation for leave to file a brief as amicus curiae GRANTED.
47	Aug 8 1983		Brief of respondents King & Spalding filed.
48	Aug 16 1983		CIRCULATED.
49	Sep 21 1983		SET FOR ARGUMENT. Monday, October 31, 1983. (3rd case)
50	Oct 28 1983	D	Motion of petitioner for leave to file reply brief, out-of-time, filed.
51	Oct 31 1983		ARGUED.
52	Oct 31 1983		DISTRIBUTED. Nov. 4, 1983. (Motion of petitioner for leave to file reply brief out-of-time.
53	Nov 7 1983		Motion of petitioner for leave to file reply brief, out-of-time, DENIED.